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General digested index to Georgia report



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A

GENERAL DIGESTED INDEX

TO

GEORGIA REPORTS;

—INCLUDING—

1, 2, 3 KELLY,	R. M. CHARLTON'S REPORTS,	
4 TO 10 GEORGIA REPORTS,		DUDLEY'S REPORTS, AND
T. U. P. CHARLTON'S " "		GEO. DECISIONS, PARTS I. & II.

COMPILED BY

T. R. R. COBB & W. W. LUMPKIN.

ATHENS, GA:

CHRISTY & KELSEA.

1852.

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OF

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GENERAL DIGESTED INDEX

TO

GEORGIA REPORTS.

ABATEMENT.

1. When both parties, plaintiff and defendant, die pending a suit upon a note, the action does not abate. Their respective representatives may be made parties, by *scire facias*, at the same time, and the action proceed. *Ex'rs of Henderson vs. Alexander, Adm'r.* 2 *Kelly*..... 82
2. In a claim case pending in the name of R. & G. B. for the use of D. as the administrator of T, D. dies: *Held*, that the suit abated until the legal representative of T. should be made a party. *Baker vs. Bethune and another.* 3 *Kelly*..... 160
3. Where a free person of color is a party to a suit in the Courts of this State and dies, the suit abates, and administration should be taken out upon the estate of such free person of color. 4 *Ga. Rep.*..... 92
4. An action of debt against a Sheriff, for an escape from final process, under the Judiciary Act of 1799, survives, notwithstanding the death of the Sheriff. *Neal vs. Haygood, Adm'r.* 1 *Kelly*..... 516
5. Where letters testamentary were revoked under the Act of 1834, on account of the birth of a posthumous child, and an intestacy declared, neither by the Common or Statute Law of England, nor the Acts of our own Legislature, can the newly appointed administrator be made a party defendant to a suit pending against the removed executor. *Martin, Adm'r vs. Broach, Ex'r.* 6 *Ga.*..... 21
6. The old Common Law maxim, that a personal right of action dies with the person, still applies where a *tort* is committed to a man's person, feelings or reputation—as for assault, libel, or *seduction of daughter.* *Brawner vs. Sterdevant, Adm'r.* 9 *Ga.*..... 69

ABATEMENT, (PLEA IN.) See *Pleading*.

ABSCONDING DEBTORS. See *Attachment*.

ACCESSORY.

1. Where principal and accessory in a felony are jointly indicted, it is a matter of discretion with the Solicitor General whether they shall be jointly or severally tried, particularly when they have joined in the general issue. *The State vs. Calvin. R. M. Charl.*..... 151
- See also, *Jones vs. The State. 1 Kelly*..... 617
And Studstill vs. The State. 7 Ga...... 2
-

ACCOMPLICE.

1. An accomplice, though included in the same indictment with the defendant upon trial, is a competent witness for the defendant. *Jones vs. The State of Georgia. 1 Kelly*..... 610

ACCORD. See *Contract*, I. 7.

ACCOUNT. See *Equity*, V. 3. VII. 16.

ACQUIESCENCE. See *Estoppel*.

ACT OF GOD.

1. A common carrier—*a fortiori*, a common person—is relieved from liability if the injury complained of arose from an act of God, such as a storm at sea. *Mein, Mackay & Co. vs. West. T. U. P. Charl.*.... 170
2. The act of God is—"such as would not happen by the intervention of man—such as storms, lightning and tempests." *Ibid.*
3. *Unavoidable* is synonymous with *inevitable*—and *unavoidable* accidents are the same with the acts of God, and mean such as are produced by physical causes which are inevitable; such as lightnings, storms, perils of the seas, earthquakes, sudden death, illness, &c. *Fish vs. Chapman & Ross. 2 Kelly*..... 356

See *Escapes*. I. 2.

ACTION. .

1. Where there was a sale of 1500 bushels of salt, to be paid for at 90 days, it was held that an action could not be brought on the contract until the expiration of the time. *Banks et al. vs. Carter et al. Dudley*..... 92
2. An action on a contract, whether express or implied, or whether by parol, or under seal, or of record, must be brought in the name of the party in whom the *legal* interest in such contract is vested. *Carruthers, Admr. vs. Wardlaw. Dudley*..... 187
3. If a bond be joint and several, the party for whose benefit it was made, may sue either or both the obligors, at his election. *Spratlin vs. Hudspeth. Dudley*..... 156
4. In an action on a bond, to save harmless a security on another bond, it is sufficient that the record shows the security to have been damaged, and the evidence upon which he became damaged need not be produced. *Ibid.*
5. The owner or holder of negotiable paper may bring action upon it, in the name of a person having no interest in it. *Field vs. Thornton.*
1 *Kelly*..... 312
6. As a general rule, it is true that suits should be brought by persons having the *legal* interest in contracts; but in the case of negotiable notes, suits may be brought in the name of persons having no such interest. They may sue as trustees for the person having the real interest. *Ibid.*
7. The question of title in a negotiable paper, is one which the defendant will not be permitted to raise, unless it is made to appear that it is necessary for the purposes of his defence. *Ibid.*
See also *Nisbet vs. Lawson.* 1 *Kelly*..... 284
8. At Common Law the action of debt against a Sheriff for escape out of final process does not survive against his representatives. Under the Statutes of Georgia, such actions survive. *Neal vs. Haygood, Adm'r. &c.* 1 *Kelly*..... 516
9. The Act of 1820 to regulate the mode of prosecuting actions against joint contractors and co-partners, applies as well to joint and several contractors (when sued as joint contractors) as to joint contractors only. *Tedlie vs. Dill.* 2 *Kelly*..... 130

10. When both parties die pending a suit, the action does not abate. Their respective representatives may be made parties by *scire facias*, at the same time, and the action proceed. *Exr's. of Henderson vs. Alexander, Adm'r. 2 Kelly.....* 82
11. Until there is a severance or destruction of a tenancy in common, one or more co-tenants cannot bring trover or trespass against the others. *Leonard vs. Scarborough et ux. et al. 2 Kelly.....* 76
12. No action will be maintained to enforce an illegal or immoral contract. *Howell, Adm'r vs. Fountain et al. 3 Kelly.....* 183
13. In an action by B on a promise by A to pay "so much money as soon as he can collect it out of C by law," it is necessary for him to prove that a reasonable length of time has elapsed, for the purpose of collecting the money, since the promise. *Woolbright vs. Snead. 2 Ga. 167*
14. Where the undertakings of the parties to a contract are concurrent, and one is ready and willing, and offers to perform, and the other is not; the first is discharged from performance, and may maintain an action against the other. *Biggers vs. Pace. 5 Ga.....* 171
15. Notwithstanding the title may have passed from the seller to the buyer, yet, if the former will not surrender the goods, the latter may either bring trover for them, or else case, for the damage from failure to deliver. *Ibid.*
16. A exposed certain slaves at public auction, which were knocked off to B. B, failing to comply with the terms of sale, agreed in writing that the negroes might be re-sold, at his loss and expense: *Held*, that to charge B, A would have to show that the second sale was consummated. *Held*, also, that B was liable for the difference in the two sales, notwithstanding A refused to let him have one of the negroes bid off by him, at the second sale; it appearing that he was re-sold the same day, for the same price. *Hicks vs. Ayer. 5 Ga.....* 298
17. A demise in ejectment cannot be stricken out because the name of the lessor is used against his consent, if the plaintiff offers to indemnify him against all loss, and if the use of his name be necessary to the assertion of the plaintiff's rights. *Fain vs. Gathright. 5 Ga.....* 6
18. In the sale of a slave, where there is a contract of warranty, the purchaser may consider the contract as a nullity, and bring his action on the case for deceit; and in such action it is not necessary that he should set forth the contract. *Dye vs. Wall. 6 Ga.....* 584
19. Where P, without authority of law, sold the land of N to P & H, after the death of N, and before administration on N's estate, and re-

ceived a part of the purchase money therefor: *Held*, that the administrator of N could not maintain an action against P, for money had and received to his use, nor for the use of the estate of N, for the reason that the legal representatives of N had not been deprived of any legal or equitable interest in the land, by such unauthorized sale, as would equally entitle them to recover the purchase money therefor. *Crews, Ex'r vs. Heard, Adm'r.* 7 Ga..... 60

20. Money paid by *mistake of law* may be recovered back in an action for money had and received, where there is a full knowledge of all the facts: *Provided*, the mistake is clearly proven, and the defendant cannot, in good conscience, retain it. *Culbreth vs. Culbreth.* 7 Ga. 64
21. The name of a party may be used as the lessor of the plaintiff in ejectment, even against his consent, where he is indemnified against costs: *Provided*, such use of his name is necessary and important to the assertion and successful prosecution of the rights of another party. *English vs. Doe ex. dem. Register.* 7 Ga..... 887
22. In an action by the vendor, on a covenant made by the purchaser in the deed, the assignees of the purchaser cannot be joined with him as parties defendant. *Brooks vs. The Water Lot Company.* 7 Ga..... 101
23. Where the charter of a bank renders the stockholders liable after the transfer of the stock, unless sixty days' notice of the sale is given in one of the public gazettes of the State, and provided the transfer is made six months before the failure of the corporation, all stockholders who have given notice, in terms of the Act, are exempt, unless the failure occurs within six months thereafter; all other stockholders are liable for the redemption of the bills, whether they have transferred or not. This liability is not primary or total, but secondary and proportional. *Lane vs. Morris.* 8 Ga..... 468
24. The right given the billholders to go upon the stockholders for the ultimate redemption of the bills, is independent of any claim upon the assets of the corporation; one which may be asserted directly in his own name, and which the assignee or receiver could not enforce, as it constitutes no part of the effects of the bank. *Ibid.*
25. The power by a corporation to sell the stock of a delinquent stockholder, is a cumulative remedy, and does not impair the right to compel payment by action. *Hightower vs. Thornton.* 6 Ga..... 486
26. Where P entered into a special written contract with R, as an overseer for the year 1847, and was to receive a stipulated portion of the crop at the *end of the year*, for his services, and in the month of August, R dismissed him from his employment, without sufficient cause or provocation; whereupon P, in the month of November of the same

- year, instituted his action against R, to recover damages for a breach of the contract: *Held*, that the action was not *prematurely* brought, and that in regard to this particular class of special contracts, where the overseer or agent is *wrongfully* dismissed from the service of his employer, he has his election of three remedies: 1st. He may bring his action immediately for any special injury he may have sustained in consequence of the breach of the contract by the defendant. 2d. He may wait until the termination of the period for which he was employed, and then sue upon the contract and recover his whole wages. 3d. He may treat the contract as rescinded, and may immediately sue on a *quantum meruit* for the work and labor he actually performed. *Rogers vs. Parham.* 8 Ga..... 190
27. If the declaration allege a special contract for the rent of mills, to be paid in repairs, and it is proven on the trial, the plaintiff cannot recover on the common count for a *quantum meruit*, but will be held to the special contract, and the measure of damages is the value of the repairs agreed to be made, and the loss sustained by the failure to make them. *Baldwin vs. Lesseur.* 8 Ga..... 71
28. The next of kin of a decedent cannot sue for his property without administration. *Reed, Guardian, vs. Wood et. al.* Ga. *Decis. part II.* 174
29. Creditors and heirs, as a general rule, can only sue third persons through the representatives of the estate. The exception is, where there is collusion, insolvency, unwillingness to collect the assets when called on, or some other like special circumstance. *Worthy et. al. vs. Johnson et. al.* 8 Ga..... 236
30. In Georgia the person injured is not bound to prosecute the offender to conviction or acquittal, before he is entitled to bring an action for the civil injury, except in treason and felony by the Common Law. *Adams vs. Barrett.* 5 Ga..... 404
31. The Act of 1826, authorizing judgment to be entered up against the principal and surety on the appeal, is only cumulative, and the party may still proceed to enforce the judgment against the surety, by writ of *scire facias*, or action of debt on the appeal bond, as at Common Law. *The Bank of Charleston vs. Moore.* 6 Ga..... 416
32. When A is indebted to B for so much money loaned, an action for money advanced will not lie in favor of C. *Davies, cashier, vs. Byrne.* 10 Ga..... 329

See *Abatement*, 2. *Pleading*, *passim*.

ADEMPION OF LEGACY. See *Will*.

ADMINISTRATORS AND EXECUTORS.

- I. APPOINTMENT, QUALIFICATION AND REMOVAL.
- II. POWERS, DUTIES AND LIABILITIES.
- III. SALES BY.
- IV. EXECUTORS *DE SON TORT*.
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I. APPOINTMENT, QUALIFICATION AND REMOVAL.

1. In an application by two of the next of kin in *equal degree*, for letters of administration with the will annexed, the Court will give the preference to the one having the greatest interest under the will. *Hoskins vs. Morel. T. U. P. Charl.*..... 69
2. Upon an application for letters of administration *de bonis non*, upon the estate of an intestate, where all the distributees at law have died since the intestate, the Court will grant the letters to the person entitled to the estate, to the *exclusion* of the next of kin of the intestate. *Clay vs. Jackson. T. U. P. Charl.*..... 71
3. The application of a creditor for letters of administration should not be denied because the evidence of his debt upon its face is barred by the Statute of Limitations. *Ex parte Caig. T. U. P. Charlton.*.... 159
6. Upon the refusal of the kindred, administration in the British Courts is, by custom, granted to a principal creditor. *Carnochan vs. Abrahams. T. U. P. Charlton.*..... 207
5. Kindred and creditors, not being citizens of Georgia, are not entitled to administration, nor can they by assignment to a citizen of Georgia, give the right of administering. Their wishes, however, should be considered by the Court of Ordinary. *Ibid.*..... 204
6. By the custom of England and the Provincial Act of 1764, the *principal creditor* is entitled to administration on refusal of the kindred, and it is not within the discretion of the Court of Ordinary to grant the letters to any other creditor. *Ibid.*..... 207—208

7. The fact that a person entitled to administration, has, by intermeddling, rendered himself liable as an executor *de son tort*, does not destroy his right to letters of administration. *Ibid*.....210—211
8. The Court of Ordinary have no authority to remove an executor *upon his own request*. In the matter of *Mussault's Ex'tr.* T. U. P. *Charl.*.. 259
9. When an estate is not competent, or barely so, to the payment of debts, in granting administration, a creditor will be preferred to the next of kin. *Sturges vs. Tuffs.* R. M. *Charl.*..... 17
10. *Quere*, if the non-resident next-of-kin, who are thereby prohibited from administration, can constitute an agent for that purpose? *Ibid*.
11. A Court of Ordinary, in all applications for probate or administration, should conform to the practice of similar jurisdictions in England; at all events to such an extent as to give the appellate jurisdiction a knowledge of the facts or doctrines which formed the basis of the judgment of the inferior tribunal. *Tupper vs. Atwood.* R. M. *Charl.*..... 100
12. Where a free person of color is a party to a suit in the Courts of this State, and dies, the suit abates, and administration should be taken out on the estate of such free person of color. *Scranton et. al. vs. Demere.* 6 *Ga.*..... 92
13. Where the Court of Ordinary have granted letters testamentary, of administration, or guardianship, to a person entitled and capable of discharging the duties of the trust, no new appointment can be made, unless the former is vacated by death, removal or some other way; and the new appointment being void, the bond also is void, given for the faithful performance of the trust delegated to the new appointee. *The Justices, &c. vs. Selman and others.* 6 *Ga.*..... 432
14. By a fair construction of the Statutes of this State, executors, administrators and guardians are required to take the oath prescribed, before the Court of Ordinary. *Echols and Wife vs. Barrett.* 6 *Ga.*.... 443
15. Where it appears from the record of the Court of Ordinary, that an administrator, appointed by the Court, was one of the Justices presiding at the time of making the appointment: *Held*, that the appointment was void, for the reason that no one can be a judge in his own case. *Ibid*.
16. The second section of the Act of 1799, which directs that all applications for letters of administration shall be made to the Clerk of the Court of Ordinary, who shall issue citation, &c. does not contravene the 6th section of the III. Article of the Constitution, which says

- "that any one or more Justices, with such Clerk, may issue citations," &c. *Ex parte Carnochan. T. U. P. Charl.*.....218
17. Letters of administration must be granted at the next term of the Court, immediately succeeding the publication of the thirty days' notice of the applicant and citation by the Clerk, unless the application is *regularly* continued by the action of the Court, from term to term, and then the parties in interest are bound to take notice of such continuance. *McGehee vs. Ragan. 9 Ga.*..... 135
18. Both by the Common Law and by Statute, the person entitled to the estate of a decedent, is entitled to the administration. *Leverett vs. Dis-mukes. 10 Ga.*..... 98
19. Where the intestate leaves neither widow nor child or children, nor the representatives of children, nor father, nor mother, but a married sister, who is his sole distributee and heir at law, the husband of the sister is entitled to administration in preference to the uncle, notwithstanding the latter is nearer in blood to the deceased. *Ibid.*
20. By the Act of 1828, a *feme covert* is disqualified from acting as a representative of an estate during *coverture*, and whenever the wife is excluded by reason of her marriage, the husband is entitled to be substituted in her stead. *Ibid.*

See *Escheat*, 2.

II. POWERS, DUTIES AND LIABILITIES.

1. A general release or receipt in full of all demands will not extend to claims held by such releasor as executor. *Wiggins vs. Norton. R. M. Charl.*..... 15
2. *Quere*, if the individual note of an executor of an estate, taken by a simple contract creditor thereof, would operate to charge the executor personally, and to discharge the estate from such debt? *Habersham vs. Hugewin et al. R. M. Charl.*..... 376
3. A vendor of real estate is not obliged to obtain judgment and a return on his execution before applying to a Court of Equity to obtain from an administrator an account of the personal estate of the intestate, and a decree of payment in case of assets, or otherwise, a lien upon the land sold. *Harden et al. vs. Miller's Adm'r. Dudleg.*..... 121
4. Co-executors and administrators are, in the eye of the law, considered as but one person for many purposes; and the acts of one

- will be considered as the acts of all, in reference to the administration of the assets. But one co-executor or administrator cannot be made chargeable with the *devastavit* of his companion, when he has not in any manner contributed thereto. *Cameron vs. The Justices, &c.* 1 *Kelly*, 87
5. By the laws of England, as adopted in Georgia, an administrator *de bonis non*, cannot call the representatives of a deceased executor or administrator to account for any property which their testator or intestate converted or wasted; nor can he claim or recover anything but those goods, chattels, and credits which remain in specie, and are capable of being identified as the property of the first testator or intestate. *Thomas vs. Hardwick, Ex'r.* 1 *Kelly*..... 88
6. Suits for assets wasted or converted, may be brought directly by creditors, legatees and distributees. *Ibid.*
7. The Act of 1821, passed for the better protection of the estates of orphans, and for other purposes therein mentioned, does not deprive persons interested, of this Common Law right, but was intended to afford them additional remedies. *Ibid.*..... 92
8. An executor is bound to return to the Court of Ordinary an inventory of the partnership effects, in which his testator had an interest as co-partner. If not in his power to procure a complete and perfect inventory, he should return his testator's interest in the partnership property, to the best of his ability; the amount of stock on hand at the time of his death; the amount of debts due from and to the co-partnership. The Court of Ordinary, in such case, will exercise a sound discretion as to the kind of inventory they will accept. *The Justices, &c. vs. Mc Laren.* 1 *Kelly*..... 291
9. Where the testator left a will, naming several executors, to whom he bequeathed in trust for certain grand-children, a portion of his estate: one of the executors only qualified, and receiving the trust property, afterwards died intestate, before the trust thus devolved on him was entirely executed. After his death, another of the executors named in the will, qualified within the twelve months provided by Statute. The last qualified executor is entitled to the possession of the unadministered portion of the trust-estate, and not the administrator of such deceased executor. *Crafton vs. Beall et al.* 1 *Kelly*..... 322
10. The administrator of a deceased executor is not the representative of such executor's testator. *Ibid.*
11. The whole interest in an intestate's personal estate vests in his administrator on the grant of letters of administration; and such grant has relation to the time of the intestate's death. *Liptrot, Adm'r vs. Holmes.* 1 *Kelly*..... 388

12. An administrator *de bonis non*, is only entitled to recover such goods and chattels of the intestate as remained in specie in the hands of the former administrator unadministered, and capable of being identified as the property of the intestate. *Paschal, Adm'r vs. Davis.* 3 *Kelly*..... 261
13. Where a decree is obtained against two administrators, for the waste committed by one, and that one subsequently pays off the execution issued thereon, he has no right to contribution from his co-administrator. *Haupt vs. Mills and Harmon, Adm'rs of Cope.* 4 *Ga.*..... 543
14. The several Statutes of Georgia, giving sureties who have paid off *fi. fa.*'s. the control against their principals, extend to the executors or administrators of deceased sureties. *Harris vs. Wynne.* 4 *Ga.*.... 521
15. Nor will the principal be allowed to show that the executor is an executor *de son tort.* *Ibid.*
16. A note made payable to A, "lawful attorney of B," is payable for A and may be sued on by him or his administrator, after his decease. *Austell, Adm'r, vs. Rice et al.* 5 *Ga.*..... 472
17. Where a testator bequeathed to his wife a certain negro slave, so long as she should reside on a particular plantation, and made no other disposition of her, and the negro was duly distributed to the legatees under the will: *Held*, that an administrator *de bonis non*, &c. could not recover possession of the negro, after the death of the legatee. *Bates, Administrator, &c. vs. Woolfork.* 5 *Ga.*..... 328
18. At Common Law, an administrator *de bonis non*, is entitled only to the goods and effects which remain unadministered, in specie, and to the debts due the intestate unpaid. *Oglesby vs. Gilmore.* 5 *Ga.*.... 56
19. Under the Act of 1845, the administrator *de bonis non*, can call the removed administrator to account. *Ibid.*
20. Where a fund is in Court, raised upon a judgment in favor of an administrator, upon which he sets up a claim for advances, the Court cannot, on motion order it paid to the administrator *de bonis non*, but he must resort to a bill in Equity. *Ibid.*
21. An administrator in Georgia can neither sue nor be sued in another State; if, therefore, he is notified to appear and defend an action of ejectment, brought in the State of *Alabama*, against one to whom his intestate has sold land with a covenant of warranty, and he disregards the notice, he is not made liable as for a *devastavit.* *Davis et al. vs. Smith et al.* 6 *Ga.*..... 274

22. It is the duty of an administrator, when sued by a creditor, so to plead as to protect the rights of all the creditors of the estate, of whose demands he has notice; and if he fails so to do, he is personally liable. *Ib.*
23. An administrator is not made personally liable for failing, in a suit against him by a creditor, to plead an outstanding covenant of warranty, made by his intestate, if at the time of the rendition of the judgment in such suit, there was no breach of the covenant. *Ib.*
24. An administrator who has been guilty of gross neglect in not making returns of the condition of the estate in his hands: *Held*, that interest should be compounded against him every six years. *Fall, Adm'r. vs. Simmons et al.* 6 Ga..... 285
25. The assent of the executor to a legacy may be implied from possession of the property by the legatee, and assent given to the tenant for life will enure to the benefit of the remainder-man *in fee*. *Jordan vs. Thornton et al.* 7 Ga..... 517
26. An executor is not, ordinarily, liable for *assets* which come to the hands of his co-executor, or responsible for his *devastavit*. If he is, however, active in the matter, and by his action, whether intentionally or not, enables his co-executor to commit a *devastavit*, he will be liable with him for it. *Hall et al. vs. Carter and Kenan, executors.* 8 Ga..... 388
27. Each executor has power, under the will, to execute it; and one has no power to prevent the other from taking possession of assets, or to take them out of his possession after he has acquired possession. *Ibid.*
28. An inventory of notes and other *choses in action*, is not of itself evidence of assets in hand to charge an executor, but he will be liable for a *devastavit*, if he fails to collect such as are collectable with due care and proper diligence. *Ibid.*
29. If two or more executors join in a receipt for money, they are, by weight of authority in England, thereby jointly liable. *Quere*—as to this rule in the United States. *Ibid.*
30. A distinction taken between a joint receipt and the joint return of an inventory. *Ibid.*
31. An inventory of *choses in action*, is a requirement of law, obligatory upon all the executors who qualify; it does not of itself show *assets* in the hands of either, so as to charge them, nor does it show a joint possession of the evidences of debt, but leaves the fact of actual possession and control in any one or all, open to proof. *Ibid.*

32. Where there is a joint return of the inventory of debts, and the possession is in one, and he, through negligence, without participation by the other, fails to collect them, he is solely liable for such *devastavit*. *Ibid.*
33. A grant in letters testamentary, to administer the goods and chattels, rights and credits of the testator, gives authority to administer the will also, as to the lands. *Sorrel vs. Hare*. 9 Ga..... 55
34. A bond by an administrator to convey real estate of his intestate, in contemplation of a sale under the *Ordinary's* order is void, and is incapable of being enforced, either at Law or in Equity, as contrary to the policy of the Statute authorizing administrators to sell the real estate of their intestate. *Logan vs. Gigley*. 9 Ga..... 114
35. An administrator with the will annexed, has no authority to administer upon any portion of the estate of the testator not disposed of by the will. *Harper, Adm'r, vs. Smith*. 9 Ga..... 461
36. Where an executor or administrator is removed and an administrator *de bonis non* is appointed, at Common Law, he can only administer upon the estate unadministered, and cannot call the removed executor or administrator to account. *Hardwick and Gilbert vs. Thomas et al.* 10 Ga..... 266
37. If there has been a fraudulent sale of the effects of the estate, by collusion between the removed administrator and the purchaser, the administrator *de bonis non* can, at Common Law, proceed against the removed administrator and the purchaser, and set aside such sale and collect in the effects so fraudulently sold. *Ibid.*
38. By the Act of 1845, the removed executor is made liable to account with the administrator *de bonis non*, and he may be compelled to account. *Ibid.*
39. Since the Act of 1845, the creditors cannot sue to collect in the assets, or cause the removed executor or administrator to account, where there is an administrator *de bonis non*, unless such administrator is insolvent or colludes with the debtors, or refuses to sue, or some other ground of equitable interference. *Ibid.*
40. When in such a suit, they rely upon the refusal of such administrator to sue, they must expressly charge a refusal, after request to sue, or charge such facts as show such neglect, as will raise a presumption of refusal, and that their rights as creditors are endangered. *Ibid.*
41. A plaintiff in ejectment is entitled to sue for and recover land, under letters of administration, authorizing him to administer "the goods

and chattels, rights and credits," &c. of his intestate. *Williams vs. Rawlins, Adm'r, &c.*..... 491

42. Where a judgment was obtained against an intestate, in his lifetime, and an execution issued thereon after his death, was levied upon his estate before the expiration of the twelve months from the date of administration: *Held*, that such levy was not legal, and that the creditor was not restrained from proceeding during the twelve months. *Ingram vs. Hart, Adm'r. 10 Ga.*..... 568

III. SALES BY.

1. An executor, under a will, authorizing the sale of property of the testator to pay debts, but without specifying the manner, may dispose of testator's slaves at private sale, and without previous advertisement of the same, or leave of the Court of Ordinary; and the purchaser at such *private sale*, will acquire a good title, even as against the creditors of the testator, provided that the purchase is *bona fide*, and without fraud on the part of the purchaser. *Bond and Murdock et. al. vs. Zeigler. 1 Kelly.*..... 343
2. A party claiming under an administrator's sale, must, in all cases, show the order of the Court granting leave to sell. *Clements vs. Henderson. 4 Ga.*..... 148
3. A general order, granting "leave to sell *all the real estate*," will be sufficient. *Per Warner, J. Ibid.*
4. To render the sale valid, all the pre-requisites of the Statute must be complied with. *Ibid.*
5. The recitals in the deed, of the advertisement, &c. will be *prima facie* evidence of the facts, until the contrary is shown. *Ibid.*
6. A sale of negroes under an order of the Court, is an administration as to them, which will charge the administrator and his sureties, and vests the note taken for such sale in the administrator. *Oglesby vs. Gilmore. 5 Ga.*..... 56
7. An order of a Court of Ordinary, directing the sale of lands belonging to an estate, is a judgment of a Court of competent jurisdiction, and cannot be impeached and attacked collaterally. Hence, when property is claimed at administrator's sale, offered for sale under such order, it is not competent for the claimant to prove, that the estate was settled and the land divided, without an administration, and that there were no debts unpaid. *McDade, Adm'r. vs. Burch, Adm'r. 7 Ga.* 559

8. If heirs elect to set aside purchases made by executors, administrators or guardians, at their own sales, they must go into Equity, and such sales are voidable only, and not, *per se*, void. *Worthy et. al. vs. Johnson et. al.* 7 Ga..... 236
9. The doctrine of *market overt*, in England, has not been generally recognized or enforced in this country *Ibid.*
10. The doctrine of *market overt* applies to judicial sales, as well as to public sales made under authority of law by executors, &c.; and *caveat emptor* is the rule of all such sales. *Ibid.*
11. Neither are Sheriffs, executors, or other officers of the law, and trustees, liable for the title or soundness of property sold by them at public sale, unless upon their own express warranty, or where fraud exists. *Ibid.*
12. Neither Sheriffs, nor executors or administrators, can bind the execution debtor, or the estate of their testator or intestate, by any covenant respecting the property sold, or any other contract originating with themselves and unauthorized by law. *Ibid.*
13. All such covenants are personal merely, if it can be plainly inferred that they intended so to bind themselves. *Ibid.*
14. Is it necessary to its validity, that every order of the Court of Ordinary, authorizing the sale of real estate or slaves, should recite upon its face that it was made fully and plainly to appear that the same was for the benefit of the heirs and creditors of the estate? Query *Ibid.*
15. Executors and administrators, in making sale of property, must comply with the statutory provisions which authorize them, in every essential direction; otherwise, the interest of heirs and creditors will not be divested. *Ibid.*
16. This rule has been somewhat relaxed in favor of *bona fide* purchasers, but operates with full force against executors and administrators, who purchase at their own sales, as well as against those who subsequently derive title from them, under a judicial sale, as execution debtors. *Ibid.*
17. An executor, under a will authorizing a sale of testator's property, without specifying the manner, may sell privately, without any previous advertisement of such intended sale, or leave of the Court of Ordinary, and the purchaser will acquire a good title, even as against the creditors of the testator, provided the purchase is *bona fide*, and without fraud on the part of the purchaser. *Bond et. al. vs. Zeigler et. al.* 1 Kelly..... 343-7

18. The purchaser in such case is not bound to see to the proper application of the purchase money by the executor; "what becomes of the price, is no concern to him;" nor is he required, before buying, to look into the accounts of the executor, to ascertain that he is faithfully administering his trust. The law presumes this in favor of the executor. But in all cases where the sale is infected with fraud and covin between the executor and purchaser, it is absolutely void, and the title to the property remains unchanged. *Ibid*..... 343-7
19. An unauthorized sale of negroes by the representatives of an estate, does not divest the title of the estate to the property. *Worthy et. al. vs. Johnson et. al.* 10 Ga..... 358
20. In case of an official sale made by an administrator, under a license from the Ordinary, the purchaser is placed in the same situation as, "to previous covenants of warranty running with the land, as the intestate was in. *Redwine vs. Brown et. al.* 10 Ga..... 311

IV. EXECUTORS *DE SON TORT*.

1. Although a son, under his father's will, may have an interest in the crop growing upon land devised, for the support of himself, his mother and other children; if his mother die, and he seizes upon the crop without being appointed executor or administrator of his mother, his interest in the crop will not shield him from liability as executor *de son tort*. *Semmes vs. Porter. Dudley*..... 167
2. *It seems*, that where possession of goods is taken by a vendee, after the death of the vendor, under a deed fraudulent as to creditors, the vendee is liable to the creditors of deceased vendor, as executor *de son tort*. *Howland, Ward & Spring vs. Dews. R. M. Charl*..... 383
3. And where the vendor remained in possession of the goods, after the execution of the deed, and the vendee took possession the day before the death of the vendor, and whilst he was *in extremis*, and the Jury found, by their verdict, that such deed was fraudulent: *Held*, that the vendee was chargeable to the creditors of deceased vendor, as executor *de son tort*. *Ibid*.
4. But it seems, in such case, that the vendee can only be charged at the suit of creditors of vendor, and that his legal representative has no remedy. *Ibid*.
5. And it seems, that the vendee is not chargeable as executor *de son tort*, if he took possession under mistake, or without fraud. *Ibid*.
6. If one takes possession of the goods of a deceased person, claiming

to be executor, or does those acts which only an executor can do, he may be charged as executor *de son tort*, though there be a rightful executor or administrator. *Ibid.*

6. So if the intermeddling be *before* probate, or grant of administration to rightful representative. *Ibid.*
7. D, sued as executor of B, pleaded, 1st. "*Ne unques executor*—2dly. Outstanding debts of equal dignity with plaintiff's." The acts done by him having made him executor *de son tort*, and the Jury having therefore, found against the *first* plea: *Held*, that having pleaded a plea false within his own knowledge, he was liable to plaintiff's demand, however small the assets in his hands; that he was not entitled to reduce the plaintiff's verdict against such assets, by proof of outstanding debts of equal dignity, and that the verdict *de bonis testatoris, si vel non, de bonis propriis*, for the whole of plaintiff's demand, was proper. *Ibid.*
8. An executor *de son tort* can give to a third person no legal control of the decedent's property. *Georgia Decisions, part II.*..... 7
9. In cases of fraud, the creditors may sue the donee as executor *de son tort* after the death of the donor. *Trippe & Slade, et al. vs. Jones, Adm'r. et. al. 2 Kelly.*..... 306
10. The several Statutes of Georgia, giving sureties who have paid off *fi. fas.* the control against their principals, extend to the executors or administrators of deceased sureties. Nor will the principal be allowed to show that the executor is an executor *de son tort*. *Harris vs. Wynn. 4 Ga.*..... 521

V. DISTRIBUTION OF ESTATES.

1. The exception in favor of judgments, mortgages and executions, contained in the Act of 1792, prescribing the priority to be observed by executors and administrators in payment of debts due by the estates of their testators or intestates, applies only to such executions, judgments, and mortgages as existed in the lifetime of the testator or intestate, and had created a lien upon their estates. *Bongaux vs. Bevan. Dudley.*..... 110
2. If there be bond debts, and the executor, &c. be sued upon a simple contract debt, he may neither pay it nor suffer the plaintiff to recover in his action; for if he do, and he have not assets besides to satisfy the debts due on bonds, he must satisfy so much out of his own estate as he has so paid, or suffered to be recovered from him; for in case of

an action brought, it is his duty to set forth in the pleadings, the debt due upon specialties, in bar of such action. *Ibid.*

3. The nature of the debts at the time of the testator's or intestate's death, is to regulate the priority of their payment, by the executor or administrator: and no preference can be created, either by greater diligence on the part of the creditor, or by the acts of the executor or administrator himself. *Ibid.*
4. A factor's lien for a general balance, accrued in the lifetime of his principal, does not attach to property coming into the factor's possession after the principal's death, by order of his representative. *Alexander W. Willy vs. R. & W. King. Georgia Decisions, part II..* 7
5. An executor or administrator cannot create a lien on property of the estate, for a debt due in the lifetime of the decedent, to the injury of other creditors. *Ibid.*
6. In the distribution of assets of an intestate, judgments rendered against the intestate, rank next to debts due the public. *Davis et. al. vs. Smith et. al. 5 Ga.....* 274
7. Judgments obtained against the administrator, rank no higher than the demands on which they are founded. *Ibid.*
8. Promissory notes are upon the same footing with "bonds and other obligations." *Ibid.*
9. A covenant of warranty, when broken, is a specialty, and the damages are to be paid rateably with bonds and other obligations. *Ibid.*
10. A surety who has paid the debt of his principal is subrogated to all the rights of the payee in the distribution of assets. *Ibid.*
11. Where a judgment was rendered against an intestate in his life-time, as principal, and his surety, and the surety has paid off the same since the death of the intestate: *Held*, that such payment, under the Statute of this State, had relation to the date of the judgment, so as to enable the surety to remunerate himself out of the property of the principal. *Ray, Adm'r, vs. Dennis. 5 Ga.....* 357
12. A dies leaving a wife and no children, but grand children living: *Held*, that the grand children, under our Statute of Distribution, take *per stirpes* and not *per capita*. *Odam et. al. vs. Caruthers, Admr.* 39
6 *Ga.....*
13. The "last or only child," as used in the Statute of 1804, as amended

- by the Statutes of 1841 and 1843, refer to the only *surviving* child of the mother. *Holder and Wife vs. Harrell*. 6 Ga..... 125
14. A dies intestate, leaving a widow and one child. The widow married the second time and gave birth to a child by the second husband. A's child dies intestate: *Held*, that the estate of the child descended to the child by the second marriage, to the exclusion of the mother. *Ibid.* 127
15. An infant in *ventre sa mere* at the time of the intestate's death, but who was born within the ordinary period of gestation thereafter, is entitled to inherit from such intestate, in a distribution among collaterals. *Morrow vs. Scott*. 7 Ga..... 585
16. In paying the debts of a decedent, mortgages have a general lien on the estate on the same footing with judgments, in the order of priority of date. *Frances Moore vs. Germain T. Dortie and J. Clayton, Ex'rs of Eugene D. Cook, deceased*. *Georgia Decisions, part II.* 84
17. An heir or legatee is not entitled to take possession of any part of the estate of his ancestor or testator, until it be delivered to him by the act of the legal representative, or the law. *Albriston vs. Bird. R. M. Charl.*..... 93
18. Funeral expenses, regulated by the circumstances of the deceased, and the usage of the country, constitute a lien or debt on the estate of the deceased, superior to all other claims. *Palmes et. al. vs. Stephens. R. M. Charl.*..... 56
19. Money may be taken in execution, if in possession of defendant. *Rogers vs. Bullin's Adm'x. R. M. Charl.*..... 196
20. Where money is made by a Sheriff at the suit of A, who has a legal or equitable claim to it, the Court, on the return of the writ, will, on motion, direct the Sheriff to pay the money over to an execution against A. *Ibid.*
21. And when such money was made at the suit of A, as administrator of B, the Court will direct it to be paid over to an execution against A, as administrator of B, where it appears to be the eldest judgment against the estate of B, and no interfering or conflicting claims by the administrator or other parties are shown to exist. *Ibid.*
22. Where a party comes into a Court of Equity to ask its assistance to interfere with the legal administration of the assets in the hands of the executor or administrator, he should at least state a clear *prima facie* case on his part, to justify such interference. *Mills et. al. vs. Lumpkin, Adm'r.* 1 Kelly.....513—514

23. Where the demands are mutual, a set off will be allowed in favor of a defendant, in an action brought by an executor or administrator, on a demand due his testator or intestate in his lifetime. *Ray, Adm'r, vs. Dennis.* 5 Ga..... 357
24. According to the provisions of the Act of 1838, the widows and orphans of testators and intestates are entitled to a reasonable support and maintenance out of their estates, for the space of twelve months immediately after the death of such testator or intestate, whether their estates be solvent or insolvent. *Hopkins vs. Lang, Ex'r.* 9 Ga..... 261
See also *Silcox et. al. vs. Nelson.* Georgia Decisions, part II..... 24
25. The widow of an intestate is not entitled to have advancements made by the intestate to his children brought into the hotchpot for her benefit. *Beavers, Ex'r, vs. Winn, Adm'r.* 9 Ga..... 189
26. The widow dying in less than one year after administration upon the estate of her husband, without having elected to take a child's part of the real estate, her executor cannot recover it after her death. *Ibid.*
27. A minor, whose parents are in life, and who has a separate estate, held to be an orphan in the meaning of the Act of 1799, "entitled an Act for the better protection and security of orphans and their estates," and entitled to the preference therein given to orphans. *Ragland vs. The Justices, &c.* 10 Ga. 65
28. Property mortgaged and not sold under the mortgage at the time of the death of the mortgagor, held to be assets in the hands of his executor or administrator, out of which orphans are entitled to be paid, to the exclusion of the mortgage creditor. *Ibid.*
29. The preference given to orphans and the estates of deceased persons, under the Act of 1799, overrides all liens upon the property of a deceased guardian, executor or administrator. *Ibid.*
See also 1 *Kelly*..... 268
- See *Dower*, 22; *Execution*, 14.

VI. BONDS, SUITS THEREON, LIABILITY OF SURETIES.

1. Distributees of an intestate's estate, after having obtained a decree against the administrator, who is insolvent, may, in Equity, pursue into the hands of the security, who is also insolvent, a note given for property sold as a part of the intestate's effects, transferred to him to protect him on his suretyship, though it has been reduced to

- judgment, and have it applied in part or whole satisfaction of the decree. *Carnes et al. vs. Jones et al. Ga. Decisions, part I.*..... 170
2. The security in such case is a trustee for creditors and distributees, and by having the judgment so applied, it is paying so much of his liability on the bond, and therefore only giving effect to the contracts between him and his principal. *Ibid.*
 3. It is no objection that the action at law on the note was not defined. This does not change the nature of the trust. *Ibid.*
 4. As it does not appear from the proceedings that there are creditors who have a higher claim than distributees, their rights cannot be discussed. *Ibid.*
 5. Creditors have the same rights as distributees on the bond, and they may pursue their remedy. *Ibid.*
 6. No recovery can be had upon an administration bond against the securities, at the suit of a creditor, until a *devastavit* against the administrator is first established according to law. *Cameron et al. vs. The Justices, &c. 1 Kelly.*..... 37
 7. The Act of 1820, authorizing securities to be joined with the principal in suits upon executors', administrators', and guardians' bonds considered. *Ray, Adm'r, &c. vs. The Justices, &c. 6 Ga.*..... 303
 8. Where the provisions of the Act of 1812, authorizing an executor, administrator or guardian, whose residence shall be changed from one County to another, to make his returns in the County in which he lives, are fully complied with, the sureties on the first bond are discharged from all farther liability on account of their principal. *The Justices, &c. vs. Selman and others. 6 Ga.*..... 432
 9. Where the Court of Ordinary have granted letters testamentary, of administration or guardianship, to a person entitled and capable of discharging the duties of the trust, no new appointment can be made, unless the former is vacated by death, removal or some other way; and the new appointment being void, the bond also is void, given for the faithful performance of the trust delegated to the new appointee. *Ib id.*
 10. Sureties to executors', administrators' and guardians' bonds, are not liable to suit thereon at law, under the Act of 13th December, 1820, until the plaintiff has first established his demand against their principal, in his representative character, by suit and judgment, or decree of a Court of competent jurisdiction. *The Justices, &c. vs. Sloan. 7 Ga.*..... 31

11. The Justices of the Inferior Court are not the legal obliges to an administrator's bond, payable to the Justices, &c. *sitting as a Court of Ordinary. The Justices, &c. vs. Wooten et al. 7 Ga.*..... 465
12. Where an administrator, upon the discharge of his first sureties, gave a new bond, and subsequently becomes insolvent: *Held*, that Equity will entertain jurisdiction of a bill against the administrator and both sets of sureties, praying a discovery of the amount of the *devastavit* and the time when it occurred, in order to charge each set of sureties according to their respective liabilities on their bonds. *Alexander, Adm'r. vs. Mercer et al. 7 Ga.*..... 549
13. It is not necessary to sustain such a bill, to obtain, first, a judgment against the administrator, it being competent for a Court of Chancery so to mould its decree as to mete out ample justice and full protection to all parties, by rendering the assets of the estate first liable, the individual property of the administrator next, and the property of the sureties only *ultimately* liable. *Ibid.*
14. A bill against the principal and sureties will be more especially sustained, where it is alleged that a portion of the assets of the estate have been delivered up to the second set of sureties, to indemnify them from liability; the nature and value of which are unknown to the complainant, who sues as *administrator, de bonis non*, of the deceased. *Ibid.*
15. The liability of the security of an administrator is an ultimate liability, not primary. *Cameron et al. vs. the Justices. 1 Kelly:*..... 37
16. In a suit upon a guardian's, or administrator's' bond, the party is not entitled to the custody of the original, but to a certified copy only. *Bryant, Guardian, and Bell, Ex'r of Pye vs. Owens & Wife. 1 Kelly* 368

VII. RETURNS, ACCOUNTS AND COMMISSIONS.

1. An administrator's accounts which have been allowed by the Court of Ordinary, are *prima facie* evidence for the administrators, when called upon to account for his administration, but never evidence of title for an administrator against third persons. *Cumming vs. Tryer. Dudley.* 183
2. Where a balance is found to be due legatees in the hands of executors, who have been guilty of gross neglect in not making annual returns to the Court of Ordinary, of the condition of the estate in their hands: *Held*, liable for interest, compounded at the end of every six years: *Held*, also that no commissions should be allowed in Equity for managing the estate. *Kenan and Carter, Ex'rs, vs. Hall et al. 8 Ga.*..... 417

3. The returns of an administrator, executor, or guardian, are only *prima facie* evidence in their favor, and may be impeached, the burden of proof being on the party impeaching them. *Brown vs. Wright*, 5 Ga. 29
4. An administrator who has been guilty of gross neglect in not making returns of the condition of the estate in his hands: *Held*, that interest should be compounded against him every *six* years on balances in his hands. *Fall, Adm'r, vs. Simmons et al.* 6 Ga..... 265
5. An executor, administrator or guardian who fails to make returns annually, according to law, forfeits all commissions for his trouble in managing the estate. *Ibid.*
6. A bill filed by distributees to recover against the representatives of a deceased administrator, upon the accounts returned and passed by the Court of Ordinary, nineteen years after the accounts were rendered, without any allegation of fraud, or setting forth any excuse or reason for the delay: *Held*, to be barred by lapse of time. *Akins et al. vs. Hill et al.* 7 Ga..... 573
7. The Court of Ordinary will exercise a sound discretion as to the kind of inventory of an executor of a deceased co-partner of the partnership effects of his testator they will accept. *The Justices vs. McLaren.* 1 *Kelly*..... 291
8. When returns are made to the Clerk of the Court of Ordinary, under the Act of 1820, it is the duty of the Court to pass them to record, or reject them at the next term of the Court after they are rendered to the Clerk, and if judgment is had after that time, passing them to record, such judgment is irregular, and may be set aside by a proceeding properly instituted for that purpose; but such judgment cannot be attacked collaterally, and will be sufficient, while unrevoked, to admit the returns in evidence, in a suit by a ward against his guardian. *Ragland vs. The Justices, &c.* 10 Ga..... 65

VIII. SUITS BY AND AGAINST.

1. Where administration granted to A is revoked on the ground that he had failed to give bond as required; and subsequently, administration is granted to A and B, the one year allowed by the Statutes, in which suits shall not be brought, should be estimated from the date of the letters last granted. *Callahan vs. The Adm'rs of Smith.* T. U. P. Charl. 148
2. An executor or administrator may maintain trover for a conversion in the lifetime of the testator or intestate. *Adm'rs of Parrott vs. Dubignon.* T. U. P. Charl..... 261

3. Where a bond is given to A as the executor of B, and A dies, the representative of A, and not of B, is entitled to bring suit upon the bond. *Horskins vs. Williamson. T. U. P. Charl.*..... 145
4. In an action against an administrator for money had and received by his intestate (which money was won at cards) it was held necessary to prove that the intestate actually received the money in question; and proof that he was in partnership with others who gambled, won and received it, was held insufficient. *Bank of Georgia vs. Clark. Dudley*..... 83
5. The officers of Court cannot issue execution for their costs, against an executor or administrator, who has obtained judgment against a defendant that proves to be insolvent. *Ibid.*
6. The practice of entering up judgment *de bonis testatoris, et si non de bonis propriis*, is contrary to law; and if such judgment cannot be entered up against an executor or administrator, for a debt due by the estate they represent, still less can they be made liable for the costs of a suit brought by them in their representative capacity, where they had obtained a verdict. *Ibid.*
7. An administrator cannot compute the year of his exemption from suit, in support of the Statute of Limitations. *Jordan vs. Adm'r of Jordan. Dudley.*..... 182
8. An administrator cannot be called to account, for the illegal waste of his intestate, committed on an estate, whereof he was executor, by bill brought by a legatee or a creditor of such wasted estate. The legal representative of such estate, must bring the suit. *Wellman vs. Armour. R. M. Charl.*..... 6
9. Where a bill seeks discovery and relief, only against the acts of one of the executors of an estate, it is not necessary to make the other executor a party in the first instance. *Morel vs. Houston. R. M. Charl*..... 291
10. But it seems, that the co-executor may be made a party, during the progress of the suit, if it shall prove to be expedient or necessary. *Ibid,*
11. Where the bill alleged, that complainant had performed medical services for negroes belonging to an estate, on the faith of such estate, and at the instance of the executor thereof, who had since died insolvent: *Held*, that in Equity, such creditor had a right to resort to the estate, in the hands of the administrator *de bonis non*, for payment. *Habersham vs. Huquenin et al. R. M. Charl.*..... 376

12. The Act of December 16, 1811, in reference to injunctions, applies to all persons, in whatever capacity they apply for the writ. An executor or administrator cannot obtain the injunction without giving bond and paying costs, as required by such Statute. *Habersham vs. Carter et. al. R. M. Charl.*..... 526
13. When, during the existence of a partnership, one of the partners dies, the Statute of Limitations does not commence running in favor of the surviving partner, until there is an administration on the estate of the deceased partner. *Gardner, Adm'r, &c. vs. Cumming et. al. Ex'rs. Georgia Decisions, part I.*..... 1
14. On a cause of action accruing after decedent's death, his executor or administrator may sue, either in his own individual or representative capacity, at his option. *Willy vs. King. Ga. Decisions, part II.* 7
15. An administrator *ad colligendum* can bring no action. *Reed, Guardian, &c. vs. Wood et. al. Ga. Decisions, part II.*..... 174
16. The next of kin of a decedent, cannot sue for his property, without administration. *Ibid.*
17. Equity will not relieve an administrator after two judgments, *de bonis testatoris* and *de bonis propriis*, have been successively recovered against him at Law. *Bostwick vs. Perkins et. al. 1 Kelly.*.....137—140
18. The administrator of an appellant, where the security on appeal, good at first, becomes insolvent, pending the appeal, is not bound to give additional security. *Latimer, Whiting & Co. vs. Adm'r's Ware. 2 Kelly.*..... 272
19. In an action of trover by an executor or administrator, who declares on his *constructive* possession, and alleges the conversion after the death of the testator or intestate, it is necessary for him to introduce in evidence his letters testamentary or of administration, on the trial, as a part of his title, to enable him to recover. *Robinson vs. McDonald. 2 Kelly.*..... 119
20. It is a good plea for a defendant who is sued as executor, that since the last continuance of the cause, his letters testamentary have been revoked, and administration committed by the Ordinary to another, to whom he has delivered over all the goods in his hands. *Broach & Broach vs. Walker. 2 Kelly.*..... 435
21. The heirs at law may maintain ejectment to recover the possession of land, against a mere wrong doer. *Caruthers vs. Bailey. 3 Kelly.* 108

22. So the administrator for the payment of debts or the making of distribution. *Ibid*..... 110
23. When a bill is filed against an executor, charging him with having wasted the trust funds in his hands, a decree may be rendered against him individually. *Saunders vs. Smith, Adm'r. 3 Kelly*..... 126
24. A obtains a judgment *quando acciderint* against B, the administrator of C. D obtains an absolute judgment against B, the administrator, for the surplus estate in his hands, coming to D, as the only heir and distributee of C. E, the security of B, upon his administration bond, pays off the judgment of D: *Held*, that A has no right to subject this money in the hands of D, to the satisfaction of his judgment *quando*. *Cairnes vs. Iverson 3 Kelly*..... 135
25. The Acts of 1842, relative to pleas of usury, applies to administrators and executors, as well as the original parties. *Persons vs. Hight. 4 Ga.*..... 474
26. If a note given for property sold by the administrator, is sued on by the administrator as such, it is mere *descriptio personæ*. *Oglesby vs. Gilmore. 5 Ga.*..... 56
27. A judgment recovered in his name is a debt due to him, upon which suit may be brought in his own name. *Ibid*.
28. Where the demands are *mutual*, a set-off will be allowed in favor of a defendant, in an action brought by an executor or administrator, on a demand due his testator or intestate in his life-time. *Ray, Adm'r, vs. Dennis. 5 Ga.*..... 357
29. When a defendant pleads a set-off of a larger amount than the intestate's demand, the plaintiff may reply by showing that the estate is insolvent, and that there are outstanding debts of higher dignity than the defendant's set-off, sufficient to exhaust the assets, for the purpose of protecting the administrator from an absolute judgment. *Ibid*.
30. The Statute of Limitations does not run against the plaintiff, in this State, during the twelve months he is inhibited from suing the defendant's executor or administrator. *Turner vs. Cowart. 5 Ga.*.... 66
31. The division of a testator's estate by the legatees under the will, by consent, is no defence to an action at law, brought by the legally appointed administrator, with the will annexed, for the purpose of recovering the testator's property, to make due and legal administration thereof. *6 Ga.*..... 443
32. Where a testator, by his will, directs a sale of his real and personal

estate, for the payment of his debts, and after payment thereof, the residue of his estate to be equally divided between his wife and children—the children to receive their shares as they successively attained the age of twenty-one years: *Held*, that the legacies of the children vested in possession on their arriving at the age of twenty-one years respectively, and that the executor was liable to account therefor, notwithstanding there was no allegation in the bill, that the debts had been paid, as it was charged a sufficient time had elapsed for that purpose, and that the sales of the testator's property had not been accounted for by the execution. *Womack vs. Greenwood, Ex'r.* 6 Ga.. 299

33. An administrator may be made a party to an injunction bill, for the purpose of enjoining him from interfering with a legacy in the hands of an executor, to which his intestate had no title, before the expiration of twelve months from the date of his qualification; there being no claim made against him in the bill for any matter or cause of action against his intestate in his life-time. *Ibid.*
34. Where letters testamentary were revoked under the Act of 1834, on account of the birth of a posthumous child, and an intestacy declared, neither by the Common or Statute Law of England, nor the Acts of our own Legislature, can the newly appointed administrator be made a party defendant to a suit pending against the removed executor. *Martin, Adm'r, vs. Broach, Ex'r.* 6 Ga..... 21
35. In a suit against an executor or administrator, in his representative character, the judgment must be *de bonis testatoris*, except when he pleads *ne unques executor*, or a *release to himself*, and the pleas are found against him. *The Justices, &c. vs. Sloan.* 7 Ga..... 31
36. Where P, without authority of law, sold the land of N to P & H, after the death of N, and before administration on his estate, and received a part of the purchase money therefor: *Held*, that no right of action accrued to the subsequently appointed representative of N, against P, for money had and received to *his use*, or the *use of the estate*. *Crews, Ex'r, vs. Heard, Adm'r, &c.* 7 Ga..... 60
37. A judgment *quando* binds all the property of the defendant's testator or intestate, except such as was in the hands of the representative at the time of the judgment, or had been previously administered by him. *Allen vs. Matthews.* 7 Ga..... 149
38. In a bill against the representatives of a deceased administrator, to open the accounts of the administrator, setting forth those accounts, and making no charge of fraud, error or mistake: *Held*, that such a bill is not demurrable, upon the ground that the complainants' case shows that they have no right to recover. It is competent for them to re-

cover the interest, if any due, upon the accounts, and commissions illegally retained. *Akins et al. vs. Hill et al.* 7 Ga..... 573

39. A bill filed by distributees to recover against the representatives of a deceased administrator, upon the accounts returned and passed by the Court of Ordinary, nineteen years after the accounts were rendered, without any allegation of fraud, or setting forth any excuse or reason for the delay: *Held*, to be barred by lapse of time. *Ibid.*

40. Where it appeared that the father of the defendant, by his last will and testament, bequeathed to him "the money advanced for him," and that the notes sued on were given by the defendant to the testator for money so advanced: *Held*, that at law, the executors of testator had the right to recover the amount of the notes from the defendant, by suit, notwithstanding the estate of the testator was solvent, and able to pay all the debts and specific legacies bequeathed by the will; and when so recovered, to dispose of the same in the due course of administration under the will. *Brewer vs. Brewer's Ex'rs.* 7 Ga..... 584

41. A Court of Equity will enjoin an administrator from recovering a tract of land, where the intestate has been dead 26 years, and the heirs were of age at the time of the death, and for more than seven years next preceding the commencement of the action, and where there are no debts against the estate, and the defendant has been in adverse possession for more than twenty years before administration granted. *Jonekin vs. Holland, Adm'r.* 7 Ga..... 589

42. The Justices of the Inferior Court are not the legal obligees to an administrator's bond, payable to the Justices, &c. sitting as a Court of Ordinary. *The Justices, &c. vs. Wooten et al.* 7 Ga..... 465

43. Where an administrator, upon the discharge of his first sureties, gave a new bond, and subsequently becomes insolvent: *Held*, that Equity will entertain jurisdiction of a bill against the administrator and both sets of sureties, praying a discovery of the amounts of the *devastavit*, and the time when it occurred, in order to charge each set of sureties according to their respective liabilities on their bond. *Alexander, Adm'r, vs. Mercer et al.* 7 Ga..... 549

44. Where the pleadings show assets in the hands of the executor, such assets are first liable for the payment of all legacies. *Demere et al. vs. Scranton et al.* 8 Ga..... 43

45. A sale of lands under a judgment, *de bonis testatoris*, against an executor, conveys a good title to the purchaser, and the title of the heirs is divested. *Doe, ex. dem. Worthy vs. Hames.* 8 Ga..... 234

46. Creditors and heirs, as a general rule, can only sue third persons

through the representative of the estate. The exception is, where there is collusion, insolvency, unwillingness to collect the assets when called on, or some other like special circumstance. *Worthy et al. vs. Johnson et al.* 8 Ga..... 236

47. The answer of an executor, that he was not privy to the fraud charged against his testator, and that he did not believe the facts alleged in the bill against him from his confidence in his integrity, is not sufficient to dissolve the injunction to restrain proceedings at law in favor of the estate. *Coffee et al. vs. Newsom, Ex'r.* 8 Ga..... 444

48. The executor or administrator, and not the heir, is the proper party to be made defendant in foreclosure, in the event of the mortgagor's death before foreclosure. *Adm'rs of Magruder vs. Adm'rs of Offutt. Dudley*..... 227

48. And the principle is the same under our law, whether the subject of the mortgage be real estate or personal property; the heirs cannot be joined as defendants in the foreclosure. *Ibid.*

49. Against the right of action to recover the property of an intestate, the Statute of Limitations will not commence to run until administration of his estate has been granted. *Doe ex dem. Conyers, Adm'r, vs. Kennon et. al.* 1 Kelly..... 379

See also, *Doe ex dem. Cofer vs. Flanagan. Ibid.*..... 539—42

50. Executors and administrators of deceased Sheriffs may be made parties in suits instituted against their testators or intestates for escapes out of final process, under the Statutes of Georgia. *Neal vs. Haygood, Adm'r.* 1 Kelly..... 515—5

51. An action will lie against an administrator with the will annexed, in Georgia, on a judgment obtained in Virginia, against an executor. *Satine vs. Clements, Adm'r.* 3 Kelly..... 428

52. An executor may bring ejectment to recover lands, but his right to recover depends upon the will, and that must be produced, as a part of his title. *Sorrel, Ex'r, vs. Ham and another.* 9 Ga.. 55

53. For the purpose of marshaling the assets of an insolvent estate, the executor or administrator may file his bill and obtain a decree, not only for the purpose of reducing the property into money, but also of ascertaining the order in which the debts are to be paid. *The Macon & Western R. R. Co. vs. Parker.* 9 Ga..... 377

54. When the administrators of deceased co-obligors are sought to be made parties defendant to an application to establish a lost bond, their

names should be stated in the petition and *rule nisi* with as much distinctness as in other suits. *Cobb et al. vs. Cobb.* 10 Ga..... 455

IX. LETTERS DISMISSORY.

1. Letters of dismissal fairly and legally obtained from the Court of Ordinary, as effectually protect executors and administrators from all further liability as such, as a decree of the Court of Chancery could do. *Smith and Wife vs. Oliver, Adm'r. Dudley*..... 190
2. Letters of dismissal are a complete bar, both at Law and in Equity, unless impeached for fraud. *Carter vs. Anderson* 4 Ga..... 516
3. The mode of procuring letters dismissory specified. *Loyless & Wife vs. Rhodes and another, Ex'rs.* 9 Ga..... 547.
4. An executor postponing a settlement with one of the legatees under false pretences, and finally delivering over the entire estate to the other legatees, will not be protected by his letters of dismissal. It is a fraud in fact, which will vitiate his discharge. *Ibid.*

ADMISSIONS. See *Evidence*, VIII.

ADVANCEMENT. See *Administrators, &c.* V.

ADVERSE POSSESSION. See *Limitation of Actions*.

AFFIDAVIT. See *Appeal; Attachment; Bail; Execution*, V.

AGENT. See *Principal and Agent*.

AGREEMENT. See *Contract*.

ALIEN. See *Dower*.

ALIMOMY. See *Husband and Wife*, IV.

ALLEVIATING LAWS.

1. *Held*, to be constitutional. *Grimball vs. Ross. T. U. P. Charl*..... 175
2. Equity causes: *Held*, to be included in the term *civil* cases in the alleviating laws. *Ibid.*

AMENDMENT.

I. IN SUPREME COURT.

II. IN SUPERIOR AND INFERIOR COURTS..

(a) AT COMMON LAW.

(b) IN EQUITY.

III. OF OFFICIAL RETURNS.

I. IN SUPREME COURT.

1. the writ of error may be amended so as to include the security on the appeal, but only upon the production to the Court of the written consent of such security, together with a waiver of the notice to which he is entitled. *Long et al. vs. Strickland. 2 Kelly.....* 349
2. The writ of error may be amended by adding a necessary party at any time during the term of the Court to which the writ is returnable, by procuring the assent of such party, and his waiver of the ten days' notice of the signing of the bill of exceptions, required by the 4th section of the Act organizing the Supreme Court. *Carey vs. Rice. 2 Kelly.....* 411
3. Where the citation mis-recites the County in which the writ of error is sued out, it will be amended on motion. *Armist vs. Barker. 4 Ga. 170*
4. A writ of error, sued out in the name of Catharine E. Beall, and others, is defective, in not stating the names of the others. But where the names of the others are apparent on the face of the record, the writ may be amended by the record; provided it does not prejudice the rights of any of the parties thereto. *Beall vs. Ex'rs of Fox. 4 Ga..* 404
5. The writ of error and citation, if without date, may be amended, if there is any thing in the record to amend by. *Anderson vs. The Darien Bank. 5 Ga.....* 582
6. The Court will not amend a writ of error, by striking out one party and inserting another. *Arnold vs. Wells and Wife. 6 Ga.....* 380
7. If the bill of exceptions bears date previous to the trial of the cause, and there is nothing in the record by which it may be amended, the writ of error must be dismissed. *Perry & Peck vs. Higgs. 5 Ga....* 43
8. The Statute of Jeofails applies to and includes the Supreme Court. *Killen vs. Sistrunk. 8 Ga.....* 281

9. The writ of error being our own process, is always amendable by the bill of exceptions or previous proceedings had in the cause. *Ibid.*
10. It is a power incidental to every Court to correct its own proceedings before final judgment. *Ibid.*
11. The Supreme Court has no power to alter or amend the bill of exceptions. *Harrington, Adm'r, vs. Roberts and Wife.* 7 Ga..... 510
12. The parties failing to indorse the entry of service as required by the rule, before the writ of error is transmitted to this Court by the Clerk below, will not be permitted to come into the Supreme Court, and, on motion, have the omission supplied. *Turner vs. Collins.* 8 Ga..... 252
13. The amended Constitution and Act of 1845, organizing the Supreme Court, exact the utmost vigilance of parties, and allow no discretion in relieving them from the failure to exercise it. *Ibid.*
14. Under the Act of February, 1850, all defects in the bill of exceptions, writ of error, and citation, may be amended instanter, and without costs, in conformity with the record of the cause below. *Higgs vs. Huson.* 3 Ga..... 317
15. Even by adding new parties. *Carey, Assignee, vs. Giles, Receiver.* 19 Ga..... 1

II. IN SUPERIOR AND INFERIOR COURTS.

(a) AT COMMON LAW.

1. Neither the Judiciary Act of 1799, or any Act amendatory thereof, nor the Common Law, nor the English Statute of *Jeofails* will authorize the Courts to permit a change of parties, and the introduction of a new cause of action, by way of amendment in the pleadings. *Cosnard vs. Eve et al. Dudley.*..... 109
2. When an order to amend a writ is taken at one term, and the amendment is not made at the next term, it cannot be amended afterwards without a new order. *Birch vs. Roberts. Dudley.*..... 172
3. A Court has the discretion to allow a writ to be amended by the insertion of the name of a party, as defendant, even after plea of abatement filed for the want of proper parties. *Coombs vs. Isaac Low & Co. R. M. Charl.*..... 395
4. Where an attachment was directed "to the Sheriff of the County of Chatham" instead of "to all and singular, the Sheriffs and Constables

of this State: *Held*, that it might be amended, it being addressed to one of the individuals entrusted by law with its execution, and there being something therefore to amend by. *Smets vs. T. J. Weathershee. R. M. Charl.*..... 587

5: Omissions of bill of particulars, amendable after verdict. *Dill and others vs. Jones.* 3 *Kelly*..... 81

6. A declaration, with the common counts for money had and received, and for money paid, laid out and expended, without specification by bill of particulars, or otherwise, on what account specially it was received or paid out, is defective; but it is such a defect as is amendable; and being cured by a verdict, is not good in arrest. *Ibid.*

7. A *capias ad satisfaciendum* may be amended so as to conform to the judgment or decree of the Court, where there is a variance in the amount, and also as to the time of its return; as when by mistake, it is made returnable on the third Monday in December, 1838, when it should have been made returnable on the second Monday in December, 1838. *Saunders vs. Smith, Adm'r.* 3 *Kelly*..... 127

8. In an action of debt on a foreign judgment, with a single count, the writ is not amendable by inserting a count on the original cause of indebtedness, on which the judgment is founded. *Latine vs. Clements, Adm'r.* 3 *Kelly*..... 427

9. Where a demurrer to the whole declaration is sustained, an amendment cannot be received, there being nothing to amend by. *Giddens Pl'ff in Error, vs. Mirk, Def't* 4 *Ga.*..... 364

10. Where a good and legal cause of action is set forth in the plaintiff's declaration, under the Act of 1818 and the rules of Court, he is entitled, on the appeal, to amend so as to avoid a nonsuit from a variance between his proof and averments, especially where the cause of action would have been barred by the Statute of Limitations. *Martin vs. Philips.* 4 *Ga.*..... 203

11. On appeal trials, the Court may allow an amendment, even after the cause has been submitted to the Jury. *Vance et. al. vs. Crawford et. al. Ex'rs.* 4 *Ga.*..... 445

12. Where there is a cause of action set forth in the plaintiff's declaration, though defectively set forth, it is amendable at Common Law, and more especially, under our Statute of 1818, which contemplates a very liberal practice in allowing amendments, both to declarations and answers. *Christian vs. Penn.* 5 *Ga.*..... 482

13. It is not competent, after judgment, upon proceedings against steam-boats, under the Act of 1841, to amend, by substituting an entire new affidavit and petition. *Butts et. al. vs. Outhbertson.* 6 Ga..... 159
14. An amendment will be allowed, changing the Christian name of the plaintiff from *William* to *James*, where it manifestly appears to the Court such an amendment will be in furtherance of justice. *Woodson vs. Law.* 7 Ga..... 105
15. A plaintiff in ejectment may amend his declaration, extending the time of his demise, after the case has been submitted to the Jury, according to the discretion of the Court, under the 54th Common Law Rule of Practice. *English vs. Doe ex dem. Register.* 7 Ga..... 387
16. It is a power incidental to every Court to correct its own proceedings before final judgment. *Killen vs. Sistrunk.* 8 Ga..... 281
17. The true criterion for determining whether an amendment is admissible, is this: whether the amendment is of another cause of controversy, or whether it is the same contract or injury, and a mere permission to lay it in a manner which the plaintiff considers will best correspond with the nature of his complaint, and with his proof and the merits of his case. *Maxwell vs. Harrison.* 8 Ga..... 61
18. The plaintiff cannot introduce an entirely new cause of action: but if he adhere to the original cause of action, he may add a count substantially different from the declaration. *Ibid.*
19. In an action of trover against one, charging him, *as trustee, &c.* the plaintiff may amend by striking out the words "*as trustee, &c.*" *Ibid.*
20. A plaintiff who has notice of a fatal defect in his declaration at the appearance term of the appeal, and makes no motion to amend until the second term, and when the cause is before the Jury, is too late, and cannot then amend. *Dorster vs. Arnold.* 8 Ga..... 209
21. It is competent for all Courts to correct errors and mistakes in their own minutes, wherever the same is brought to their notice, provided the rights of third persons be not prejudiced. *Barefield vs. Bryan.* 8 Ga..... 463
22. Affidavits of illegality are, upon motion and leave had, amendable instant, by the insertion of new and independent grounds, provided the defendant will swear that he did not know of such grounds when the affidavit was filed. *Higgs vs. Huson.* 8 Ga..... 317
23. Where a declaration on notes, payable in specific articles, did not aver the value of those articles at the maturity of the notes: *Held,*

at Common Law, after the cause has gone to the Jury, such a defect is not amendable. *Phillips vs. Dodge.* 8 Ga..... 51

24. When the verdict is imperfect in not finding for or against a portion of the plaintiffs: *Held*, that after it has been received and recorded, and the Jury discharged from the further consideration of the cause, it is error in the Court, after the expiration of four days, to re-assemble the Jury, and amend the verdict according to what they stated it was their *intention* to find: such intention not appearing on the face of the verdict. *Settle vs. Allison et al.* 8 Ga..... 201

25. In declaring on a contract—in which A agrees to gather and distil the peaches in B's orchard, and deliver to him one third of the brandy, *provided that A runs two stills, or runs one still and can do it*; a failure to aver that *A ran two stills, &c.* is fatal, upon special demurrer, but is amendable. *Murphy vs. Lawrence.* 2 Kelly..... 258

26. A breach by assignment generally, that defendant has not performed his promise or agreement is bad upon special demurrer. *Ibid.*

27. An application to amend a judgment, is an appeal to the discretionary power of the Courts. *Saffold vs. Keenan.* 2 Kelly..... 344

28. After fourteen years' acquiescence, the discretion of the Court in refusing to amend a judgment, will not be controlled, especially where the application is against conscience. *Ibid.*

29. A verdict may be amended so as to conform to the declaration, if the error be apparent upon the face of the record. *Evans vs. Rogers.* 1 Kelly..... 467

30. The allowance or disallowance of amendments in pleading are matters within the discretion of the Court. *Ibid.*

31. Judgments may be amended so as to include back interest, after execution has been issued and returned. *Alexander vs. Troutman.* 1 Kelly..... 471

32. Where a promissory note is sued on, barred by the Statute of Limitation on its face, and the defendant pleads the Statute, the plaintiff may, under our judicial system and practice, amend his petition by alleging a new promise, so as to prevent the operation of the Statute. *Beard and another vs. Simmons.* 9 Ga..... 4

33. A declaration or answer may be amended at any time before the case is finally submitted to the Jury, if the principles of justice require it. *Bryant vs. Hambrick.* 9 Ga..... 188

34. The doctrine of amendments of records and judicial proceedings in England and in this country, stated. *Short vs. Kellogg*. 10 Ga..... 180
35. The Supreme Court will not control the discretion of the Circuit Court in refusing to allow a *nunc pro tunc* judgment of non-suit, founded upon an entry on the Judge's docket, and parol proof of what was ordered to be done, ten years having intervened. *Ibid*.
36. It is not competent for plaintiff, at the trial term of a cause, to amend his declaration, by adding a count thereto, containing a new and distinct ground of injury not before complained of. *Pearson vs. Reid*. 10 Ga..... 598
37. The forms prescribed in the Act of 1847 are not amendable, except to make them conform to the forms laid down in the Act. *Cameron vs. Moore and Wife*. 10 Ga..... 368

(b) IN EQUITY.

1. Injunction bills may be amended so as to insert additional facts, relating to the same subject matter or contract, which existed prior to filing the bill, by leave of the Court, without prejudice to the injunction. *Walker, Ex'r, vs. Walker*. 3 Kelly..... 309
2. In Equity, where a demurrer to the whole bill has been sustained, there is nothing to amend by; but, where any part of the bill is left untouched, the whole may be amended. *Dudley vs. Mallory*. 4 Ga..... 52
3. The amendments to a bill, generally refer to the time of suing out the original. They become part of it, and with it constitute but one record. *Carey, Assignee, vs. Hillhouse*. 5 Ga..... 251
4. Where there is a clear mistake, or other good cause for amending a sworn answer, the practice is to file a supplemental answer. *Martin vs. Atkinson*. 5 Ga..... 390
5. Amendments to sworn answers will be allowed, in cases of mistake, fraud, surprise and the discovery of new matter, but with great caution and difficulty. There is, however, no general rule, and the application is made to the discretion of the Court, and each case must depend very much upon its own merits. *Ibid*.
6. Amendments will be allowed after replication filed. *Ibid*.
7. Where it is made to appear to the Court, upon oath, that the defend-

ant intended to swear when he first put in his answer, as he desires by the amendment to be permitted to swear, it will be allowed. *Ibid.*

8. A complainant may amend the title of his bill so as to make it conform to the true character of the case made by it. The prayer of the bill may also be amended so as to enable the complainant to have such relief as the allegations in his bill will authorize. *Dearing vs. The Bank of Charleston.* 6 Ga..... 581
9. Where a bill in Equity is amended by the complainants, at the first term, and served within two months thereafter, defendant cannot excuse himself from complying with the usual rule, on the ground of the amendment, especially as to the original bill. *Carter and another vs. McDougald et al.* 7 Ga..... 293
10. The pleadings in Equity causes, pending on the appeal, are not amendable as a matter of course, but only by leave of the Court, on special cause shown. *The Geo. R. R. & Banking Co. vs. Milnor & Co.* 8 Ga..... 313
See also *Boyd, Adm'r, vs. Clements.* 8 Ga..... 522
11. Where, in the exercise of its discretion, the Court below allows an amendment, this Court reluctantly interferes to control that discretion. *Ibid.*
12. A bill will never be dismissed for want of parties, when the proper parties can be made, either by amendment or supplemental bill. *Hightower vs. Thornton.* 8 Ga..... 486
13. The 4th Common Law Rule of Practice does not apply to Courts of Equity. *Boyd, Adm'r, vs. Clements.* 8 Ga..... 522
14. Where a cause in Equity is pending, and the pleadings made up and issue joined, the complainant is not entitled to amend, as a matter of right, but amendments will be allowed on special cause shown. *Ibid.*
15. *Surprise* is a good special cause for the allowance of an amendment. *Ibid.*
16. An application by a defendant to file a supplemental answer in Chancery, will be narrowly and closely inspected, and to authorize the Court to allow it, a just and necessary case must be clearly made out. *Carey, Assignee, vs. Ector, Adm'r, et al.* 7 Ga..... 99
17. The application to the Court for leave to file a supplemental answer, on the ground of a mistake in fact, or surprise, must be accompanied with an affidavit, in which the defendant must swear, that when he put in his original answer, he did not know the facts or circumstances

on which he applies, or any other circumstances upon which he ought to have stated the facts otherwise, or that when he swore to his original answer, he meant to swear in the sense in which he now desires to be at liberty to swear to it. *Carey, Assignee, vs. Ector, Adm'r.* 7 Ga. 99

18. Where the pleadings are made up and the cause on trial, the evidence closed and the argument progressing, it is not competent to amend the bill but for special cause; and not then, if the amendment introduces a new cause of action. *Peacock vs. Terry.* 9 Ga. 137

19. After the pleadings are made up and the cause set down for a hearing, the answer cannot be amended upon the ground that the defendant was ignorant of the availability in law of a fact within his knowledge, from the time the suit was instituted, as a defence thereto. *Branch, Adm'r, vs. Dawson.* 9 Ga. 592

See title *Equity*, VI.

III. OF OFFICIAL RETURNS.

1. Where the execution of the writ by the Sheriff appears to be before the issuing of the same, the officer will be allowed to amend the same, on motion. *Fitzgerald vs. Garvin et. al.* T. U. P. Charl. 284

2. Where a Constable levies on land or negroes, without first making return "that there was no personal property to be found," or that "the defendant being in possession, pointed out the land or negroes:" Held, that such entry can be made, *nunc pro tunc*, by the officer who made the levy. *Hopkins vs. Burch.* 3 Kelly. 222

3. A Sheriff, who in his return upon an attachment, had failed to enter, that he had advertised the same at the court-house, may amend his return, and insert the same, *nunc pro tunc*. *Wilson vs. Ray.* T. U. P. Charl. 109

APPEAL.

I. FROM ORDINARY.

II. IN SUPERIOR OR INFERIOR COURT.

(a) BY GIVING BOND AND SECURITY.

(b) IN FORMA PAUPERIS.

(c) BY EXECUTORS AND ADMINISTRATORS.

III. APPEALS GENERALLY, AND WHEN AN APPEAL LIES.

I. APPEALS FROM ORDINARY.

1. An appeal from the Court of Ordinary to the Superior Court, is an appeal from the judgment of the former tribunal, founded on the evidence adduced to it, and no other evidence should be received by the appellate jurisdiction. *Tupper vs. Atwood. R. M. Charl.*..... 100
2. On an appeal from an order of the Court of Ordinary establishing a will, the burden of proof as to the capacity of the testator, rests upon the party claiming under the will; and the propounder must go forward on the trial, and is entitled to open and close the argument. *Potts vs. House, Ex'r. 6 Ga.*..... 324
3. Where an appeal is taken from the Court of Ordinary to the Superior Court, under the Act of 1805, which requires the appellants to give security to the Clerk for all costs which may accrue by reason of such appeal: *Held*, that an acknowledgment taken by the Clerk that the appellants and their security were jointly and severally bound to the appellees for the payment of all costs which should accrue upon the appeal, in terms of the Statute, was a good and valid appeal, according to the true intent and meaning of the Act of 1805; and that the appellants and their sureties would be bound for the costs accrued by reason of the appeal. *Hogg et. al. vs. Mobley. 8 Ga.*..... 256

II. IN SUPERIOR OR INFERIOR COURTS.

(a) BY GIVING BOND AND SECURITY.

1. The Act of 1799, requiring the party appealing to give security for the *eventual condemnation money*, does not, in its spirit, require the plaintiff to give security for any thing more than the costs and damages for a frivolous appeal—in other words, the extent of his eventual liability. *Cook vs. King. T. U. P. Charl.*..... 265
2. An appeal from the verdict of a Petit Jury of the Inferior or Superior

- Courts, to a Special Jury, is considered as a *de novo* investigation, and new and additional testimony may be admitted upon the trial of such appeal. *Tupper vs. Atwood. R. M. Charl.*..... 558
3. An appeal may be taken from a confession of judgment, reserving the liberty of appeal, as well as from the verdict of a Jury. *Nisbet vs. Lawson 1 Kelly.*..... 278
4. The appeal bond need not be attested by the Clerk. *Ibid.*
5. If the Clerk sends up the original papers, together with a certified copy of the appeal bond, it is a compliance with the Act which requires him to *transmit the appeal.* *Ibid.*
6. An appeal may be entered by the attorney of record. The law does not require the party appealing to sign the bond. If he recognizes and satisfies the act of his attorney, he will be bound by the bond. *Ibid.*
7. Where one only of three defendants, enters an appeal, under the Act of 1839, and one of the others dies pending the appeal, his legal representative must be made a party before the cause can proceed. *Stell, Guardian, vs. Glass. 1 Kelly.*..... 483
8. A security on the appeal, being an incompetent witness for the appellant, may be discharged and other security substituted in his place, under an order of the Court, at the instance of the appellant, for the purpose of rendering such former security competent. *Davis et al. vs. Anderson et al. 1 Kelly.*..... 192
9. Under the Judiciary Act of 1799, allowing appeals to be entered, upon the payment of costs, and giving security for the eventual condemnation money, the party appealing need not himself sign the bond. *Pettee vs. Flewellen. 2 Kelly.*..... 237
10. After a cause has been submitted to a Petit Jury, either party has the right to confess judgment, reserving the liberty of appeal, with or without the consent of the other party. *Hicks vs. Ayer. 5 Ga.*.... 298
11. After final judgment against the original party, it is competent for the plaintiff, by *sci. fa.* to charge the security on the appeal. *6 Ga.* 416
12. Where there are several parties, plaintiff or defendant, and only one appeals, under the Act of 1839, the party not appealing, is bound by the first verdict; but as the whole record is taken up by the appeal, the plaintiff is not entitled to have execution against the party not appealing, until the final trial on the appeal. *Allison vs. Chaffin. 8 Ga.* 330

13. Where one of several parties appealing, signs the bond with security, and the others fail, the appeal is good as to the party signing; under the Act of 1839. *Weeks and Wife vs. Sego.* 9 Ga..... 199
14. An appeal bond, signed by four sureties, who gave the Clerk to understand at the time that a fifth, whose name was contained in the body of the instrument, was to sign also, may be considered as delivered absolutely, and not as an *escrow*. *Riley vs. Johnson.* 10 Ga..... 414

(b) APPEAL—IN FORMA PAUPERIS.

1. When a new trial is granted on the verdict of a Petit Jury, and it is shown to the Court that the party is unable to appeal, because he cannot give security, the Court will, on payment of costs, direct the case to be transferred to the appeal docket, and allow it to be tried before a Special Jury. *Stewart vs. Grimes et al. Dudley*..... 209
2. An affidavit of the party appealing "that he is unable to give security," without alleging that his inability "is owing to his poverty," is not a sufficient compliance with the Act of 1842. *Gibbons vs. McComb.* 3 Kelly..... 253

(c) BY EXECUTORS AND ADMINISTRATORS.

1. Where an appeal has been entered by the intestate, in his life-time, and the security, good at the time, becomes insolvent pending the appeal, the administrator of the deceased is not bound to give additional security. *Latimer, Whiting & Co. vs. Adm'rs Ware.* 2 Kelly..... 272
2. An executor is entitled to appeal without security, when the judgment is to affect only the assets of the decedent in his hands; *aliter*, where the judgment is against him personally, and for which he is responsible out of his own funds. *McCay vs. Devers.* 9 Ga..... 184

III. APPEALS GENERALLY: AND WHEN AN APPEAL LIES.

1. In this State, the right of appeal from a Special Jury to a hearing before another Special Jury, exists in Equity cases. *Pool vs. Barnett. Dudley*..... 8
2. An appeal from the verdict of a Petit Jury of the Inferior or Superior Courts to a Special Jury of the Superior Court, is considered as a *de novo* investigation, and new and additional testimony may be admitted upon the trial of such appeal. *Tupper vs. Atwood. R M. Charl*..... 100

3. But an appeal from the Court of Ordinary to the Superior Court, is an appeal from the judgment of the former tribunal, founded on the evidence adduced to it, and no other evidence should be received by the appellate jurisdiction. *Ibid.*
3. An agent in fact, who had applied for letters of administration, in the name of his principals, a commercial house resident and present, has no right to enter or prosecute an appeal from the judgment of the Court below, in his own name. *Ibid.*
4. An appeal cannot be entered from the judgment of the Court, founded on *special verdict*. *Lemden vs. Gribbin. R. M. Charl.*..... 187
5. Entering security on an appeal is a matter of record. *Georgia Decisions, part II.*..... 54
6. Authority, to bind one as security on appeal, can be given if at all, only under seal. *Ibid.*
7. A Magistrate cannot bind a security on appeal, by signing his name, under a verbal authority. *Ibid.*
8. An appeal may be taken from a confession of judgment, reserving the right of appeal, as well as from the verdict of a Jury. *Nisbet vs. Lawson. 1 Kelly.*..... 278—9
9. The recognizance of appeal need not be attested by the Clerk. *Ibid.* 279
10. It is not the duty of the Clerk to certify the day on which the Court adjourned, in sending up the appeal. It will be presumed, unless the contrary appear, that the appeal was entered within the four days after the adjournment of the Court at which the verdict was obtained. *Ibid.*..... 279
11. If the Clerk send up the original papers, together with a certified copy of the appeal bond, it is a compliance with the Act which requires him to *transmit the appeal*. *Ibid.*..... 279
12. An appeal may be entered by the attorney of record. The law does not require that the party appealing should sign the bond. He must pay cost and give security for the eventual condemnation money, (unless exempted on account of his poverty.) His signature to the bond is only necessary to signify his assent to the appeal. If put there by the attorney at law, he will be bound by the bond, if he subsequently recognize and ratify the act. *Ibid.*..... 280
13. Where one only of three defendants enters an appeal under the Act of 1839, and one of the other two dies between the first and second

- trial, he was a party to the appeal so far as to require his legal representative to be made a party to the cause before it can proceed. *Stell, Guardian, vs. Glass.* 1 *Kelly*.....433—5
14. Where an appeal is entered, a writ of error will not lie for any errors committed by the Court below upon the trial before the Petit Jury. *Carter & Wife vs. Buchanan.* 2 *Kelly*..... 338
15. An appeal does not lie from a verdict rendered upon an issue of fraud, formed under the Act of 1823, called the "Honest Debtor's Act." *Armist vs. Barker.* 4 *Ga.*..... 170
16. An appeal does lie from a verdict rendered on an issue formed upon a return to a summons of garnishment, as a matter of right. *Strickland vs. Maddox.* 4 *Ga.*..... 393
17. After a cause has been submitted to a Petit Jury, either party has a right to confess judgment, reserving the liberty of appeal, with or without the consent of the other party. *Hicks vs. Ayer.* 5 *Ga.*.... 298
18. Where a warrant of attorney was executed under the rule of the Court, to confirm an appeal entered by the agent of the party to the suit, in which it was recited that he "ratified" and "confirmed" all that the agent had done or might thereafter do in the premises, "without incurring cost to me:" *Held*, that the authority of the agent to enter the appeal was ratified by his principal, and that he would be bound for all costs necessarily incident to the entering such appeal, notwithstanding the qualification in the warrant of attorney. *Scranton et al. vs. Demere et al.* 6 *Ga.*..... 92
19. After final judgment against the original party, it is competent for the plaintiff, by *scire facias*, to charge the estate of the security on the appeal. *The Bank of Charleston vs. Moore.* 6 *Ga.*..... 416
20. The Act of 1826, authorizing judgment to be entered up against the principal and surety on the appeal, is only cumulative, and the party may still proceed to enforce the judgment against the surety by writ of *scire facias*, or action of debt on the appeal bond, as at Common Law. *Ibid.*
21. Where there are several parties, plaintiff or defendant, and only one appeals, under the Act of 1839, the party not appealing is bound by the first verdict; but as the whole record is taken up by the appeal, the plaintiff is not entitled to have execution against the party not appealing, until the final trial on the appeal. *Allison vs. Chaffin.* 8 *Ga.*..... 330
22. A judgment rendered in the appellate Court against the parties not appealing is irregular, and should be vacated. *Ibid.*

23. The privilege allowed to claimants, by the Act of 1821, of capriciously withdrawing claims once, must be exercised before a verdict has been rendered for damages in favor of plaintiffs in execution. It cannot be done afterwards, so as to take the case out of Court, notwithstanding an appeal has been entered. *Attaway, Guardian, vs. Dyer et al.* 8 Ga..... 184
24. The question discussed, whether under our Statute, where the defendant, upon a plea of set-off, recovers a balance against the plaintiff, the plaintiff has a right, on the appeal, to dismiss his action, so as to defeat the judgment. *Ibid.*
25. The Act of 1822, which declares that "where an appeal is entered from the first verdict, the property of the party against whom the verdict is rendered, shall not be bound, except from the signing of the judgment on the appeal, except so far as to prevent the alienation by the party, of his, her, or their property, between the signing of the first judgment, and the signing of the judgment on the appeal," is intended only to prevent the alienation of property by the defendant, pending the appeal to the injury of the plaintiff: Held, that under this Act, two judgments being obtained in favor of two plaintiffs at the same term, against the same defendant, upon one of which only an appeal is entered, and pending that appeal the defendant aliens his property, which is finally brought to sale after a judgment on the appeal, the judgment on the appeal is not entitled to share in the distribution of the fund with the judgment at Common Law, upon which no appeal was entered. *Snelling vs. Parker et al.* 8 Ga..... 121
26. In case of issues joined on distress warrants for rent, either party has the right of appeal to a Special Jury. *Hale vs. Burton. Dudley.* 105
27. An appeal under the Act of 1837, incorporating the Irwinton Bridge Company, carries nothing but the question of damages. *Harrisons vs. Young.* 9 Ga..... 359
28. Where the law guarantees to parties the right of appeal, and no time prescribed within which it shall be entered, it must be done within four days from the date of the decision complained of—that being a reasonable time, according to the general law regulating appeals. *The State vs. Dean.* 9 Ga..... 405
29. An appeal must be entered by the appellant in person, or by his attorney at law or in fact, duly authorized by warrant for that purpose. *The Com. of Roads, &c. 580th Dis. vs. The Griffin, &c P. R. C.* 9 Ga. 487
30. May an attorney at law, who appears on the first trial, enter an appeal without special authority? And is it his duty to do so? *Quere. Ibid.*

31. When the Petit Jury in a claim case have returned a verdict giving damages against the claimant, and the verdict is appealed from, and pending the appeal, the claim is withdrawn: *Held*, that the case goes on as to the question of damages, and stands for trial as before, and no execution can issue for the damages until the appeal is disposed of. *Strickland vs. Maddox et. al.* 9 Ga..... 196

32. In a cause pending in the Superior Court, it is competent for the parties to appeal, by consent, without paying costs or giving bond, and without affidavit of inability to do so. *Ross vs. Tedder.* 10 Ga.. 426

See *Evidence*, IV, 14.

APPEARANCE. See *Practice*.

APPLICATION OF PAYMENTS. See *Payments*.

ARBITRAMENT AND AWARD.

1. Where the submission includes "all accounts and other matters respecting property of *every nature whatever*," the award need not be confined to the matters between the parties *as individuals*, but also as *guardians and trustees*. *King vs. Cook.* T. U. P. Charl..... 286

2. An award must be certain and final. *Ibid.*

3. Where the submission was to A and B, and if they could not agree "they are empowered to choose an umpire;" an award signed by A, B, and the umpire, is valid. *Ibid.*

4. It is not necessary that an award should be under seal. *Ibid.*

5. An award requiring one of the parties to pay money to the children of the other is valid. *Ibid.*

6. An agreement to submit the controversy to arbitration is an admission that the pleadings in the cause are perfect. *Boog vs. Bayley.* R. M. Charl..... 190

7. A *lis pendens*, either in Chancery or Common Law, may be submitted to arbitration by agreement, without an order of Court. *Ibid.*

8. And where, by the agreement entered into, the award was to be made

a rule of Court, and judgment entered thereon, and judgment was entered without objection, all pre-requisites will be presumed to have been complied with. *Ibid.*

9. When the arbitrators, meaning to follow the law, mistake it, it is a good ground for setting aside their award, so far as it is affected by that mistake. *Champneys vs. Wilson. R. M. Charl.*..... 206
10. But if, without reference to the law, they make an equitable decision, it is no objection to the award, that in some point, it is against law. *Ibid.*
11. Where, by the terms of submission, two persons were to be appointed, with power, if they should disagree, to call in "a third," and upon such disagreement, a third person was called in, and signed the award with one of the other arbitrators; *Held*, that such third person was only an *arbitrator*, and that therefore, there was no necessity for him to convene the other arbitrators to deliver to them his decision. *Ibid.*
12. The award of an *interested* arbitrator, whose interest was unknown to the party at the time of the submission, will be set aside in a Court of Equity. *Milnor & Co. vs. Ga. R. R. & Bkg Co. 4 Ga.*..... 385
13. No man can be a judge in his own case. *Ibid.*
14. It is not necessary, to constitute an award in every case, that there should be a *technical* or formal award rendered—a judgment of the arbitrators, deciding finally the matters submitted, is all that is necessary. *Ibid.*
15. Where the contractors on a railroad stipulated with the company, to finish their work, by a certain time, and the company agreed to furnish the material along the line: and it was further agreed, that all matters of difference arising under the contract, should be determined by the engineer of the company, without further recourse or appeal: *Held*, that Equity had jurisdiction of a claim for *time lost* through the breach of the contract, on the part of the company, notwithstanding the engineer had refused to allow the claim—the bill charging that the engineer was a stockholder to the amount of \$10,000, a fact unknown to the contractors, at the time of the submission. *Ibid.* 385
16. Ignorance of one's legal rights in ratifying an award: *Held*, not to be sufficient to set it aside. *Tyler vs. Stephens and another, Adm'rs, &c. 7 Ga.*..... 278
17. In a bill filed to set aside an award, the defendant may rely upon the award, without pleading it. *Ibid.*

18. The testimony of a subscribing witness to a submission and award, is the best evidence of their execution. *Ibid.*
19. Upon a motion to set aside an award, made by an umpire, the Court will not consider the irregular and improper acts of the arbitrators. *Crabtree vs. Green.* 8 Ga..... 8
20. When arbitrators disagree, and the decision devolves upon an umpire, clothed with all the powers of the arbitrators by the submission, his duties are not limited to the determination of the questions upon which they disagree, but extend to all questions submitted. *Ibid.*
21. It is not a valid objection to an award, deciding that land in dispute belongs to one of the parties, that it does not direct a conveyance of the land to be executed. *Ibid.*
22. It is not necessary that an award of lands, which the submission directs to be made in writing, under the hands of the arbitrators, should be under seal. *Ibid.*
23. It is not necessary to the validity of an award, that the umpire give reasons for his decision. *Ibid.*
24. When questions of law are directly submitted, the decision of the arbitrators will be final, unless it appear on the award that the arbitrators, intending to decide according to the law, have plainly mistaken what it is, and have acted on an erroneous rule of law. *Ibid.*
25. An umpirage will not be set aside in a case where the losing party was notified that the arbitrators had disagreed, and that the papers were in the hands of the umpire to decide, and when he was asked by the umpire if he desired him to re-hear the case, and he replied that he did not desire it, but was satisfied that he should proceed to determine according to the papers in his hands, on the ground that such party was not notified of the time and place of making, and was thereby denied the right of appearing, examining witnesses and submitting evidence. *Ibid.*
26. An award of land is sufficiently certain, if it describe the land by metes and bounds, land-marks and contiguous possessions, accompanied with a plat. *Ibid.*
27. An award must generally cover all the matters submitted; but if the words of the award are not co-extensive with the submission, it will still be good, if it decides all the matters actually in dispute between the parties. *Ibid.*

ARRAIGNMENT. See *Indictment*.

ARREST.

1. If a party under arrest, be required to execute a bond not *according to law*, duress may be pleaded and the bond or recognizance be avoided. *The Governor vs. Williams et. al. Dudley*..... 244
- 2 A Lieutenant of a company raised under the Act of Congress of 11th February, 1847, is not exempt from arrest on civil process, under the Act of 1818, which exempts the militia of this State from arrest, while in actual service. *McCarthy, Sheriff, and White vs. Souther et al. Kelly*..... 408

ARREST OF JUDGMENT. See *Judgment*.

ARSON.

1. Where the testimony is conflicting, as to the character of the house alleged to have been burned by the defendant, a new trial will not be granted where the law and the facts have been fairly submitted to the Jury. *McLane vs. The State. 4 Ga*..... 335
2. An indictment charging the defendant with burning a house, used as a dwelling house, is sufficient. *Ibid*.

ARTICLES OF SEPARATION. See *Husband and Wife*, III.

ASSENT. See *Legacy*.

ASSETS. See *Administrators, &c*.

ASSIGNMENT.

I. AT LAW.

II. IN EQUITY.

III. FRAUDULENT ASSIGNMENTS; AND HEREIN OF ASSIGNMENTS BY INSOLVENT DEBTORS.

I. AT LAW.

1. Under the Statute of Georgia, bonds are made negotiable; the legal title passes by assignment. *The Adm'r Shefftell vs. the Adm'r of Clay. T. U. P. Charl.*..... 229
2. The Common Law maxim that choses in action were not assignable, was a bad one, and the Courts will take care that it never shall work injustice. *Ibid.*
3. A Court of Law will protect the assignment of a chose in action, under the same rules with a Court of Equity. *Ga. Decisions, part II.* 99
4. Such assignment transfers the interest, notwithstanding a subsequent garnishment, by a creditor of the assignor. *Ibid.*
5. Notice to the debtor, of the assignment, is not necessary to protect the assignee. *Ibid.*
6. The assignee of a promissory note not negotiable, takes it subject to all the equities which existed between the assignor and maker thereof, at the time of the assignment, and all equities which may attach in favor of the maker, before notice of the assignment. *Guerry vs. Perryman. 6 Ga.*..... 119
7. The Bank of Columbus made an assignment of its effects, and its charter was afterwards forfeited by a judgment of the proper Court, at the instance of the State. The Legislature, subsequent to the forfeiture, affirmed the assignment, and placed the assignee upon the footing of a receiver. In a suit, by the holder of the bills of the bank against the assignee: *Held*, that a demand of payment of the bills, made by the plaintiff on the receiver, after the forfeiture, did not entitle him to recover ten per cent. damages under the Act of 1832. *Carey, Assignee, vs. Green. 7 Ga.*..... 79

8. Where the rights of a party plaintiff depend upon the facts, that an assignment was made by a bank to the defendant, and that he accepted it, the plaintiff must prove them, notwithstanding they are recited in a public Act of the Legislature. *Dougherty vs. Bethune, Assignee.* 7 Ga..... 90
 9. In an action against the assignee of a bank, a plea that there never was an assignment made to him, and a plea that defendant is not the assignee of the bank, are pleas in bar of the action. *Ibid.*
 10. In an action by the vendor, on a covenant made by the purchaser in the deed, the assignees of the purchaser cannot be joined with him as parties defendant. *Brooks vs. The Water Lot Company.* 7 Ga.... 101
 11. The Act of 1799, makes the instruments therein enumerated negotiable, in such manner and under such restrictions as are prescribed in the case of promissory notes. They must be payable to the payee's order or assigns, or to bearer, as prescribed by the Statute of Anne. *Broughton vs. Badgett.* 1 Kelly..... 77
 13. A bill of sale to a slave, containing warranty of soundness, is neither at Common Law, the Statute of Anne, nor by our own Act of 1799, negotiable by indorsement, so as to vest in the indorsee a right of action on the warranty. *Ibid.*
 14. Whether an instrument under seal can be transferred by an indorsement not under seal? Quere. *Ibid.*..... 76
 15. The Act of 1799, has reference exclusively to liquidated demands, whether for money or other things, and applies to those instruments alone, which are for payment of an ascertained sum of money, or of some specific article or articles of property. *Ibid.*..... 77-8
 16. A specialty is defined by Littleton to be a bond, bill, or such like instrument—a writing or deed under the hand and seal of the parties. *Ibid.*..... 77
- See *Banks.*

II. ASSIGNMENTS IN EQUITY.

1. Courts of Equity have never recognized the doctrine that choses in action were not assignable, but have always protected the rights of the assignee. *Adm'r of Sheftell vs. the Adm'r of Clay.* T. U. P. Charl. 230
2. Though a bond and mortgage have been assigned, if the bill alleges that such assignment was colorable, and that the assignee had notice

of the usury pervading the original contract, in the absence of a specific refutation of such allegations, the Court will grant an injunction. *Wynn vs. Ham & Mora. R. M. Charl.*..... 70

3. Where, by a decree of a Court of Equity, a specific sum of money was decreed to be due to the maker of an unnegotiable promissory note, by the payee thereof: *Held*, that such decree could not be impeached by extrinsic evidence, so as to impair or defeat the equitable right of such maker to set off such decree for the full amount thereof, against such note in the hands of an assignee for a valuable consideration, but who had never given any notice to the maker of the note of such assignment. *Guerry vs. Perryman. 6 Ga.*..... 119

III. FRAUDULENT ASSIGNMENTS, AND HEREIN OF ASSIGNMENTS BY INSOLVENT DEBTORS.

1. A plaintiff cannot assign a debt, the subject of a suit, during the pendency of the suit, to the prejudice of third persons. *Westbrook vs. McDowell. Georgia Decisions, part I.*..... 133
2. A mortgage is neither an assignment in trust, nor a conveyance, or transfer, under the Act of 1818; and therefore is not void under that Act. *Seals & Upham vs. Cashier et al. Ga. Decisions, part II.*..... 76
3. A *bona fide* and absolute conveyance of any part, or the whole of his estate, by a person unable to pay his debts, (even to a creditor in satisfaction of a pre-existing debt, whereby another creditor is excluded from any share or portion of the estate so conveyed) if the same be free from any trust for the benefit of the seller, or any person appointed by him, is a valid conveyance, and not obnoxious to the Act of 1818. *Eastman et al. vs. McAlpin. 1 Kelly.*..... 171
4. A mortgage would be obnoxious to the provisions of the Act of 1818, and void, if used as an instrument of fraud, for the purpose of securing to the mortgagor a *secret* trust or benefit within the intent and meaning of said Act. *Davis et al. vs. Anderson et al. 1 Kelly.*..... 193
5. But a mortgage, executed by a debtor in insolvent circumstances, to a creditor, to secure the payment of a *bona fide* pre-existing debt, is not, *per se*, fraudulent under said Act, as against creditors. *Ibid.*
6. If a creditor purchase property of his debtor in satisfaction of his own debts and the debts of other favored creditors, and buy a large surplus over, to the exclusion of a particular creditor, whose suit is pending, it is a badge of fraud. *Peck vs. Sand. 2 Kelly.*..... 8
7. The general rule is, that to entitle a creditor to come into Equity, to

obtain satisfaction out of the equitable estate of his debtor, he should have first pursued his legal remedies to every available extent without being able to obtain satisfaction: yet he may file his bill at once to set aside fraudulent conveyances, made by defendants in *fi. fa.* with intent to delay, hinder, or defraud creditors; nor is it necessary that there should be a return of "*nulla bona*," where it appeared by *aliunde* proof that all their effects were exhausted, except those embraced in the conveyances alleged to be fraudulent. *Thurmond et al. vs. Reese.*

3 *Kelly*..... 452

8. If an insolvent debtor assigns his property to one or more persons in trust, for a portion of his creditors, to the exclusion of the rest, such conveyance is null and void, by the Act of 1818 as against those who are excluded. *Ezekiel vs. Dixon.* 3 *Kelly*..... 157

9. An insolvent debtor may, in a great variety of ways, under the laws of Georgia, give a preference, *bona fide*, to one creditor over others. *McWhorter vs. Wright, et al.* 5 *Ga.*..... 555

10. A covenant by a surety to pay the debts on which he is surety, is a valuable consideration for a grant or conveyance of negroes and other property by an insolvent debtor. *Ibid.*

11. A being insolvent, and largely indebted to B, conveys certain property to C, to be held for his, A's use, and that of his family, and delivers possession. Afterwards, he agrees with B, in consideration of a full discharge, to turn over to him all his property, real and personal, and all his rights of property. In pursuance of this agreement, A turns over to B, all his property, except that conveyed to C, and B executes him a full release: *Held*, that the agreement between A and B is a contract of sale, and that the title to A's estate vested in B, including the property conveyed to C: *Held*, that the conveyance to C is a mere nullity, and so to be regarded, when in any Court it comes in conflict with the rights of creditors; and also, that the judgment creditors of B, he being also insolvent, and a return of "*nulla bona*" on their executions, may, in a Court of Equity, by decree, apply the property so conveyed to C, in payment of their judgments, together with the rents, issues and profits thereon. *Woodard et al. vs. Solomon et al. Ex'rs.* 7 *Ga.*..... 246

12. A being insolvent, and largely indebted to B, conveys certain property to C, to be held for the use of A and his family; afterwards he agrees with B, to turn over to him all his property and rights of property. In pursuance of this agreement, A turned over to B all of his property, except that conveyed to C, and B executes a release; *Held*, that the title to the property conveyed to C, vested in B, and that the conveyance to C is a mere nullity, and so to be regarded, whenever in any event it comes in conflict with the rights of creditors. *Ibid.*

13. If an insolvent debtor pending suit, runs personal property to another State, for the purpose of defeating his creditor, and there sells it to one who has full knowledge of the fraudulent purpose for which it was removed, the contract will be declared void in the Courts of this State, in a contest between the vendee and creditor. *Watts vs. Kilburn.* 7 Ga..... 356
14. A *bona fide* purchaser without notice, from a purchaser, with notice of the fraud, will be protected. *Herndon vs Doe ex dem. Kimball.* 7 Ga..... 432
15. An insolvent debtor cannot prefer one class of creditors, under the Act of 1818, by a conveyance in trust for their benefit. The decision in *Ezekiel vs. Dixon* approved. *Brown et al. vs. Lee et al.*..... 267
16. Where B executed a deed of assignment to C in trust, for the benefit of certain creditors, which deed was void under the Act of 1818, and subsequently executed a mortgage of the same property, to secure the payment of a *bona fide* debt: *Held*, that the mortgagees, as creditors, might avoid the first conveyance, and have the proceeds of the property mortgaged applied to the payment of their mortgage debt; that as against them the first conveyance was in law a nullity. *Lee et. al. vs. Brown et. al.* 7 Ga..... 275
17. An assignment of assets by a bank, (insolvent at the time, and about making a general assignment, and against which proceedings are pending to revoke its charter,) made to a creditor cognizant of these things, and by collusion with him to defraud the other creditors: *Held*, to be void, and that the assets so assigned is a trust fund, to be applied to the payment of the debts of the corporation. *Hightower et al. vs. Mustian.* 8 Ga..... 506
18. The cashier of a bank may do, independently of a board of directors, whatever properly appertains to his office; and one of these acts is to pay the debts of the bank, by a transfer of negotiable securities. It is not, therefore, competent to show that such a transfer is void, by proof that it was made after the board of directors had resigned, and when the presidency of the bank had been assumed by a person who was neither an officer or director: *Held*, farther, that such a transfer, made under such circumstances, is valid in law, but that it is admissible to prove these facts upon an issue of fraud, *in fact*, or not. *Carey, assignee, et al. vs. Giles, receiver.* 10 Ga..... 9
19. An assignment made by an insolvent bank, to pay an existing debt to a creditor, is not void in law, by the General Law, or under the Act of 1818, because the amount of effects assigned is larger than would be reasonably sufficient to pay the debt, and because there is a stipulation that the excess shall be returned to the bank. *Ibid.*

20. It is competent to attack such an assignment upon the ground of fraud, *in fact*, and any fact or circumstance within the allegations of complainant's bill, may be proven, which will go to show that the bank *intended* to perpetrate a fraud in making the assignment. *Ibid.*
21. Is an assignment by a debtor of a part of his property to trustees, for the benefit—1st, of such creditors as should, within a given time, execute a release, and the surplus, if any, to the other creditors generally, valid? Quere? *Jones vs. Dougherty*. 10 Ga..... 273
22. When the deed is for the payment of the creditors, their assent will be presumed, unless their dissent be expressed. *Ibid.*
23. It has been held, that if the creditors are not parties or privies to the deed, and the trustee has not dealt with them in performance of its provisions, that the deed operates merely as a power to the trustee, and is revocable by the debtor; but the revocation must be made before the creditors have affirmed the trust by filing their bill to enforce it. *Ibid.*
24. The death of a debtor does not operate as a revocation of the trust. *Ibid.*
25. An assignment to creditors for the payment of their debts, or to trustees for that purpose, cannot be said to be without consideration, especially if one of the trustees be himself a creditor, and the conveyance purports to be founded upon a consideration, however small. *Ibid.*
26. A deed void as to creditors, may, nevertheless, be good between the parties. *Ibid.*
27. A plaintiff cannot assign a debt, the subject of a suit, pending the suit, to the prejudice of third persons. *Georgia Decisions, part I....* 133

ASSIGNMENT OF ERRORS. See *Error*, II.

ASSIGNMENT OF EXECUTION. See *Execution*, IV.

ASSUMPSIT.

1. An express contract of sale cannot be recovered on, under a general *indebitatus assumpsit* count; it must be specially declared upon. *Banks et al. vs. Carter et al. Dudley*..... 92
2. *Indebitatus assumpsit* will not lie, to recover a collateral article. *Farrar vs. Barber. Georgia Decisions, part II.*..... 125
3. A count in *tort* cannot be joined with one in *assumpsit*. *Hill et al. vs. Lippitt. Ga. Decisions, part II.*..... 89
4. Where *assumpsit* is the proper remedy, a *scienter* is not necessary, to enable a party to recover for fraudulent representations. Hence, alleging fraud and *scienter*, in such case, is mere surplusage, and will not make the count sound in *tort*, so as to constitute a misjoinder with a previous money count. *Ibid.*
5. In *assumpsit*, all the facts being stated, from which the law implies a promise, a formal allegation of a promise is not necessary. *Bell vs. Hobbs. Ga. Decisions*..... 144
6. *Assumpsit* lies concurrently with debts on contracts, expressed or implied, for remuneration for personal services, as well as for all the usual money demands. *Mahaffee vs. Petty et al. 1 Kelly*..... 265
7. Compendious forms of each. *Ibid.* Per NISBET, J.
8. The action for money had and received, is an equitable action, extensively remedial, yet it is subject to rules. It does not give to Courts of Law jurisdiction which belongs to Courts of Equity. *Whitehead vs. Peck. 1 Kelly*..... 148
9. This action does not lie where there is not a contract expressed or implied, between plaintiff and defendant. There must be such a contract as creates a privity between the parties. *Ibid.*..... 149
10. It does not lie to enforce every imaginable equity between man and man, growing out of moneyed transactions. *Ibid.*
11. It lies in all cases where money is in the hands of another, which *ex æquo et bono*, the plaintiff is entitled to recover, and which the defendant is not entitled, in conscience, to retain. Yet this good and just right in the plaintiff, and this conscientious liability in the defendant, grow out of privity of contract, either expressed or implied in law. *Ibid.* Per LUMPKIN, J.

12. When a security who is indemnified by mortgage, voluntarily pays a usurious note, and is subsequently reimbursed by his principal, in property, the latter cannot recover of the creditor the excess of interest in an action for money had and received. *Whitehead vs. Peck.*
1 *Kelly*.....145—148
13. Usury paid by a surety may be recovered back by him, in this form of action, but not by the principal, though he has reimbursed the surety. There is no privity of contract, either expressed or implied, in law, between the principal and his creditor, in such a case. Per NISBET, J. *Ibid*..... 150
14. The action for money had and received, has been of late years, extended, on the principle of its being like a bill in Equity, and therefore in order to recover, on a count for money had and received, the plaintiff must show that he has equity and conscience on his side, and that he could recover it in a Court of Equity. Per WARNER, J. *Whitehead vs. Peck*, 1 *Kelly*..... 153
15. The payment of the money by B to P, having been subsequently adopted and ratified by W, and B reimbursed therefor, W was entitled, both in Law and Equity, to recover the amount of usurious interest from P, who received it, equally as if the money had been paid directly by W, to P, out of his own hands. *Ibid*..... 155
16. Where the surety pays, it is in contemplation of law, a payment made for the principal debtor, and he may recover it in an action against the principal for so much money paid for his use. *Ibid*....155—6
17. If parties think proper to treat property delivered in payment and received as cash, they have a legal right to do so, and such payment, in judgment of law, will be considered as a cash payment. *Ibid*..... 155
18. The money which P receives from B, over and above the principal and lawful interest, was in legal contemplation, W's money, paid by B to P, for him, and which, in Equity and good conscience, P ought to refund, and the law raises an assumpsit in favor of W, and creates a privity of contract between P and W, which authorizes W to recover in this form of action. *Ibid*..... 156
19. When it appeared that the plaintiff in a suit for the price of lumber delivered, had a cash and credit price, and the usual term of credit had expired before suit, it was held that he might recover the credit price, though the lumber was charged in the bill of particulars at the cash price, under the expectation that the account would be paid when presented. *Taylor vs. Tucker*. 1 *Kelly*..... 235
20. There must be a time averred in the writ, when every material or traversable fact transpires. *Bond vs. The Central Bank*. 2 *Kelly*..... 99

21. In a suit by the bearer against the maker of the note, the omission in the declaration to allege the time when the note was transferred, is cured by verdict or confession of judgment. *Ibid.*
22. No promise need be alleged in a declaration, when the facts set forth show a legal liability without it. *Ibid.*
23. A declaration with the common counts for money had and received, and for money paid, laid out and expended, without specification by bill of particulars, or otherwise, on what account specially it was received or paid out, is defective; but it is such a defect as is amendable, and being cured by a verdict, is not good in arrest. *Dill et. al. vs. Jones.* 3 *Kelly*..... 81
24. Where P, without authority of law, sold the land of N to P and H, after the death of N, and before administration on N's estate, and received a part of the purchase money therefor: *Held*, that the administrator of N, could not maintain an action against P, for money had and received to his use, nor for the use of the estate of N, for the reason that the legal representatives of N had not been deprived of any legal or equitable interest in the land, by such unauthorized sale, as would equitably entitle them to recover the purchase money therefor. *Crews Ex'rs, vs. Heard, Adm'r.* 7 *Ga.*..... 60
25. Money paid by mistake of law, may be recovered back in an action for money had and received, where there is a full knowledge of all the facts: *Provided*, the mistake is clearly proven, and the defendant cannot in good conscience retain it. *Culbreath vs. Culbreath.* 7 *Ga.*.... 64
26. If one sells property of another, without authority, the owner may waive the *tort*, and sue him for the money. *Merchant's Bank vs. Rawls et al.* 7 *Ga.*..... 191
27. If the declaration allege a special contract for the rent of mills, to be paid in repairs, and it is proven on the trial, the plaintiff cannot recover on the common count for a *quantum meruit*, but will be held to the special contract, and the measure of damages is the value of the repairs agreed to be made, and the loss sustained by the failure to make them. *Baldwin vs. Lesseur.* 8 *Ga.*..... 71

ATTACHMENT.

- I. WHEN IT LIES, AND AFFIDAVIT TO OBTAIN.
- II. ATTACHMENT BONDS.
- III. SUBSEQUENT PROCEEDINGS,
- IV. AMENDMENTS OF ATTACHMENTS, &c.
- V. LIEN OF.
- VI. VOID ATTACHMENTS.
- VII. ATTACHMENTS FOR CONTEMPT.

I. WHEN IT LIES, AND AFFIDAVIT TO OBTAIN.

1. An affidavit for attachment, which states that "defendant is removing without the limits of this State, as this deponent doth verily believe," is sufficiently positive, under the Act of 1816. *Ginnis vs. Bacon. Dudley.* 195
2. If plaintiff in his affidavit use the words "has absconded," they are sufficient, under the Act of 1799, though the words in that Act are used in the present tense. *Selleck vs. Tuedsdell. Dudley.*..... 196
3. In the same affidavit for attachment, plaintiff may set forth notes due, that are not due, and that he is indorser on certain other notes of defendant, which are not yet due, without subjecting himself to the consequences of a misjoinder of actions, the Acts of 1799, 1816, and 1820 being in effect but one Act, so far as this point is concerned. *Selleck vs. Tuedsdell. Dudley.*..... 196
4. A plaintiff who makes an affidavit for an attachment, does not entitle himself to the benefit of the Act of 1816 and 1820, by simply showing in his affidavit that the defendant absconds. To obtain the benefit of these Statutes, he must state that his debtor is removing, or about to remove without the limits of this State, according to the Act of 1816, and that the principal debtor is removing, or about to remove, or has removed without the limits of the State or County, according to that of 1820. *Ibid.*
5. J. E. W. one of the mercantile firm of J. E. W. & Co. of Savannah (whose commercial house was in Liverpool) whilst in the latter place, drew his individual bill in favor of the plaintiff, on his house in Savannah, who accepted the same, but afterwards suffered it to be protested for non-payment: *Held*, that the payees of said bill were entitled to take out process of attachment against the individual estate of the non-resident drawer, as drawer, in addition to the remedy, by

- action against the firm of J. E. W. & Co. as acceptors. *Richardson et al. vs. White. R. M. Charl.*..... 53
6. An affidavit taken for the issuing of an attachment, signed by Daniel Herman, and attested by a judicial officer, which in its body describes the person sworn as Daniel Herman, is a sufficient oath under our attachment laws. *Kahn vs. Herman. 3 Kelly.*..... 269
7. The property of a foreign corporation within this State, is liable to be attached, under our attachment laws. *South Carolina R. R. Co. vs. McDonald. 5 Ga.*..... 531
8. Where an agent or attorney, in making an affidavit for an attachment, swears *positively* to the indebtendness of the debtor to the creditor, it is no objection to the affidavit, although such agent or attorney may swear under the Act of 1836, to the *best of his belief*, from the evidence in his possession. The Act of 1836 is permissive, not compulsory. *Levy vs. Millman et al. 7 Ga.*..... 167
9. An affidavit that the debtor "has absconded," is insufficient. It must state that he "absconds." *Ibid.*
10. Under the 2d section of the Act of 1816, attachments can issue against a debtor for a debt *not due*, only when the debtor is *about to remove* without the limits of this State. *Ibid.*
11. Affidavits, under our attachment laws, should be signed by the Magistrates before whom they are taken, with the addition of their official description. *Birdsong & Sledge vs. McLaren. 8 Ga.*..... 521
12. An attachment, *ordinarily*, cannot issue for a partnership debt against one of the partners, individually, and believed on the partnership property, on the ground of the non-residence of the defendant in attachment. *Secus*, if the non-resident partner or partners were the only survivors of the firm. *Wiley & Co. vs. Sledge. 8 Ga.*..... 532
13. An attachment sued out by an attorney, on the ground that "he was informed and believed" that the debtor resided out of the State: *Held*, insufficient. *Devprey vs. Eisenach. 9 Ga.*..... 593

II. ATTACHMENT BONDS.

1. The bond given in pursuance of the Statute regulating attachments, must be such a bond as can be enforced by the Courts of this State; therefore, if the obligor reside in another State, the bond is bad, and the attachment will be dismissed. *Thompson vs. Arthur. Dudley..* 253

2. An attachment bond which contains the conditions prescribed by law, and the further condition, that the plaintiff shall prosecute his suit with effect, at the term to which it is returnable, is substantially in conformity with the Statute, and sufficient to prevent the dismissal of the attachment. *Kahn vs. Herman*. 3 *Kelly*..... 271
3. Under the Act of 1799, bond and security must be given before an attachment can issue. *Levy vs. Milman et al.* 7 *Ga.*..... 167
4. Where the attachment bond is made payable to the individual members of a firm, where the attachment is sued out against the firm, and it does not recite that the obligees compose the firm, the bond and attachment are both void. *Birdsong & Sledge vs. McLaren*. 8 *Ga.*... 521
5. In order to sue out an attachment in behalf of a firm, one partner has the right to execute a bond in the name of the firm. *Dow, Wilson and another vs. Smith & Co.* 8 *Ga.*..... 551
6. The plaintiff in attachment swears that there is due to him, from the defendant, on note, forty-five dollars and ninety-two cents, *besides interest*: Held, that a bond given only for double the sum of forty-five dollars and ninety cents, is a compliance with the Statute which requires the plaintiff in attachment to give bond in a sum equal to double the amount sworn to be due. *Saulter & Ivy vs. Butler*. 10 *Ga.*..... 510

III. SUBSEQUENT PROCEEDINGS ON ATTACHMENTS.

1. If defendant in attachment appear and put in special bail, he dissolves the attachment, relieves his goods from its lien, and it becomes henceforth a proceeding in *personam*. *Inferior Court vs. Barr et al.* *Dudley* 33
2. Attachment may also be dissolved by defendant's giving bond with good security to appear, abide by, and perform the order or judgment of the Court, and after attachment is dissolved, the proceeding need not be advertised. *Ibid.*
3. A judgment in attachment may be set aside in a Court of Law, upon an issue suggesting fraud or want of consideration, tendered by a judgment creditor of the defendant in attachment. *Smith vs. Gettinger et al.* 3 *Kelly*..... 141
4. A declaration in attachment need not recite the previous proceedings, which are already part of the record. *Bell vs. Hobbs*. *Ga. Decisions, part II.*..... 144
5. Declarations founded on the process of attachment, must be filed at

- the first term of the Court to which the attachment is made returnable. *Birdsong & Sledge vs. Brooks*. 7 Ga. 88. *Levy vs. Millman et al.* 167
6. The levy of an attachment must be advertised by the officer levying the same, at the court house in the County to which the same is made returnable, at least thirty days before the sitting of the Court. *Levy vs. Milman et al.* 7 Ga. 167
7. A general judgment creditor cannot form an issue and traverse the truth of the affidavit of the attaching creditor, after judgment rendered on the attachment, and on a motion to distribute money belonging to the defendant. *Dow, Wilson and another vs. Smith & Co.* 8 Ga. 551
8. Land cannot be levied on and sold under an order of the Magistrates, on attachments returnable to Justices' Courts. It must be by virtue of an execution issuing upon the judgment in attachment. *Rogers vs. McDill & Campbell.* 9 Ga. 506
9. There is no Statute in Georgia, authorizing an agent to execute a forthcoming bond for property levied on by attachment. *Gilmer vs. Allen.* 9 Ga. 208

IV. AMENDMENTS OF ATTACHMENTS, &c.

1. The Sheriff failing to return that he has advertised his proceeding according to law, may amend his return at any time. *Wilson vs. Ray. T. U. P. Charl.* 109
2. Where an attachment was directed "to the Sheriff of the County of Chatham," instead of "to all and singular the Sheriffs and Constables of this State:" *Held*, that it might be amended, it being addressed to one of the individuals entrusted by law with its execution, and there being something, therefore, to amend by. *Smets vs. T. & J. Weather-
shee. R. M. Charl.* 537
4. All the Statutes relating to attachments, being *in pari materia*, must be taken together. *Ibid.*

V. LIEN OF ATTACHMENTS.

1. The lien of attachments is created by the levy, and not the judgment on attachment, and in all cases of conflicts between attachments, the one first served, shall be first satisfied. *McDougald vs. Barnard.* 3 Kelly. 172
2. In a contest between attachments and ordinary suits, it is the judgment, and not the levy, which fixes the lien. *Ibid.* 178

3. In a contest between attachments and ordinary judgments, the lien is fixed by the judgment, and not by the levy. *Barker et al. vs. McDougald et al.* 5 Ga..... 176

VI. VOID ATTACHMENTS.

1. Where an attachment issued under the Act of 1799, more than thirty days before the next Court in the County in which it was levied, and was made returnable nearly twelve months after its date: *Held*, to be null and void by the express declaration of the Act. *Casey vs. Wiley & Co.* 5 Ga..... 333
2. Where the attachment bond is made payable to the individual members of a firm, where the attachment is sued out against the firm, and it does not recite that the obligees compose the firm, the bond and attachment are both void. *Sledge et al. vs. McLaren.* 8 Ga..... 251

VII. ATTACHMENTS FOR CONTEMPT.

1. A Sheriff cannot execute an attachment for contempt of Court, out of his County. *The State vs. Harrell.* Ga. Decisions, part I..... 130
2. If it is admitted to be true, or found so by a Jury, upon issue submitted for that purpose, that the Sheriff suffered a prisoner, in custody under an attachment, to go at large in the jail, with a full knowledge that there was a breach in the wall of one of the rooms, through which he could and did escape, the Sheriff is liable to an attachment, and the party injured will not be driven to his action for an escape. *Craig et al. vs. Maltbie.* 1 Kelly..... 547-9
3. A Sheriff is liable to be attached, for the failure of his deputy to pay over money collected on an execution by him. *In the matter of John L. Stephens.* 1 Kelly..... 587-91
4. Where a Sheriff has collected money on an execution, and fails to pay it over, the party injured by such failure, may have an attachment for contempt against such Sheriff; and if such attachment is procured at the instance of the plaintiff in execution, for his own benefit, and to redress his own individual wrong, it is a *civil* process, and such plaintiff in execution is liable to pay the costs of the Sheriff's imprisonment, and not the County. *The Justices, &c. vs. Bivins.* 6 Ga..... 575
5. Where a rule is made absolute against a Sheriff, for the payment of money, an attachment for contempt cannot issue thereon against him, until he is first called upon to show cause why an attachment should not issue. *Davis vs. Irwin.* 8 Ga..... 158

6. Where the Sheriff arrested a defendant under *ca. sa.* and took a bond for his appearance, for less than twice the amount of the creditor's claim: *Held*, that the escape was negligent, and not voluntary, and that the Sheriff might retake the defendant, and discharge an attachment for contempt, by surrendering him in Court. *Colley vs. Morgan.* 5 Ga..... 178
7. When an attachment has been granted against a Sheriff, for neglecting to levy an execution, he may purge his contempt by selling all the defendant's property, and bringing the money into Court, before the attachment issues, even if other *fi. fas.* claim it all. *Chittenden vs. Brady.* Ga. Decisions, part II..... 219

See *Contempt*.

ATTORNEY.

1. An attorney who institutes a suit for a client, living out of the State, or out of the County, where the defendant resides, is liable for all cost, in the event of the suit being dismissed or his client cast; or if he recover, and judgment be entered up, and execution issue, and there is a return thereon of no property, he is still liable for costs. *Carmichael vs. Pendleton et al.* Dudley..... 174
2. Where the party has been prevented from availing himself of his legal defence, by the irregularity of the commissioners nominated by himself, to take testimony, or the misconduct of his attorney, he will not be entitled to an injunction. *Albritton vs. Bird.* R. M. Charl.. 93
3. It is sufficient, if a warrant of attorney be exhibited when demanded: it may be executed at any stage of the suit. *Nichols et al. vs. Dennis et. al.* R. M. Charl..... 188
4. A warrant of attorney continues to exist after judgment, if any other process is required to obtain the full benefits of such judgment. *Ibid.*
5. A warrant of attorney to carry on a suit, was given to L and M, attorneys at law, and co-partners; judgment was obtained thereon, and after the death of L, *sci. fa.* was issued against the bail by M and N, who had entered into copartnership: *Held*, that the copartnership of L and M, was revived as to the cases brought by them, by the copartnership of M and N, and that the latter firm had authority to prosecute such process under such warrant of attorney. *Ibid.*..... 188

6. A declaration seeking to charge an attorney on a promissory note, placed in his hands for collection, must either allege that he received the money, or that the debt was good, and a reasonable time had elapsed, and that it had not been collected and paid over, or that the claim had been lost by neglect, or want of professional skill. *Nisbet vs. Lawson.* 1 *Kelly*..... 281-2
7. The attorneys at law against whom no fraud is charged nor relief sought, ought not to be made parties with their clients, in a bill to set aside a judgment at law. *Kenan et. al. vs. Miller.* 2 *Ga*..... 328
8. A letter addressed by the plaintiff's attorney to the Sheriff, authorizing him to allow certain payments in calculating the amount due on sundry *fi. fas.* does not give that officer power to enter those sums as credits upon said *fi. fas.* *Harden et al. vs. Central Bank.* 5 *Ga*..... 449
9. An attorney at law who has money or other effects belonging to the defendant in his hands, is subject to be garnisheed. *Tucker vs. Banks et al.* 6 *Ga*..... 580
10. Where an agent or attorney, in making an affidavit for an attachment, swears positively to the indebtedness of the debtor to the creditor, it is no objection to the affidavit, although such agent or attorney may swear, under the Act of 1836, to the best of his belief, from the evidence in his possession. The Act of 1836 is *permissive*, not compulsory. *Levy vs. Milman et al.* 7 *Ga*..... 167
11. An attorney is bound to the highest honor and integrity—to the utmost good faith—yet, if in the exercise of a diligence beyond the powers and obligations of his trust, he realizes a fund upon a judgment in his own favor, out of the debtor, he is not bound to apply it to his client's claim. *Cox vs. Sullivan.* 7 *Ga*..... 144
12. An attorney is bound to reasonable skill and diligence, and is liable for ordinary neglect; and the skill required has reference to the character of the business which he undertakes to do. *Ibid.*
13. The damages do not necessarily extend to the whole amount of the debt which he assumes to collect, but only to the loss which his client has actually sustained. *Ibid.*
14. The client is not bound to any diligence, unless stipulated for in the contract. *Ibid.*
15. Bill for an account by a client, against an attorney, should be dismissed on demurrer, if any account can be fairly taken in a Court of Common Law, and suitable relief had, there being no discovery sought or required, or allegation in the bill, to show the peculiar remedial

process or functions of a Court of Equity to be necessary. *Powers et al. vs. Cray, Receiver.* 7 Ga..... 206

16. An attorney's receipt described the note, but omitted an indorsement upon it: *Held*, in an action upon it, that it was competent to prove the indorsement by parol. *Cox vs. Sullivan.* 7 Ga.. 144

17. A, indorsee of a negotiable note, given by B, placed the same in the hands of an attorney for collection. B, as collateral security for the payment of said note, placed in the hands of A's attorney, a larger amount of notes and other evidences of debt, against third persons, taking a receipt therefor, from A's attorney, in which the attorney stipulates, as soon as he collected sufficient to pay B's note, to deliver the same to B, and pay him any balance there might be remaining: *Held*, that the evidences of debt were not taken in satisfaction of B's note, and that such receipt did not amount to any agreement, by A's attorney, not to sue B, till the securities mentioned therein could be collected. *Pennington vs. Watson.* *Dudley*..... 98

18. May an attorney at law, who appears on the first trial, enter an appeal without special authority? And is it his duty to do so? *The Com. of Roads, &c. 580th Dis. vs. The Griffin, &c. P. R. Co.* 9 Ga..... 487

19. For counsel to attempt surreptitiously to get before the Jury, by way of *supposition*, facts which have not been proven, is highly reprehensible. *Berry vs. The State.* 10 Ga..... 511

See *Continuance*, 23 to 28; *Costs*, I, 1.

AUGUSTA.

1. Under the authority to pass all ordinances requisite for the *security*, welfare, and convenience of the City, the City Council are empowered to pass an ordinance regulating the keeping and retailing of gunpowder within the corporate limits. *Williams vs. The City Council.* 4 Ga..... 509

2. "*Criminal cases*," as used in the 1st sec. 4th art. of the Constitution of Georgia, refers to violations of *public laws*, and not *local by-laws* of Towns or Cities. *Ibid.*

3. "*Trial by Jury as heretofore used*," does not refer to pecuniary penalties imposed by municipal corporations. *Ibid.*
4. Under the charter giving them authority to establish by-laws and ordinances, respecting *streets, wagons, &c.* the City Council have authority to regulate the weight which should be carried by loaded wagons over the streets of the City. *Nagle vs. The City Council.* 5 Ga..... 546
5. By the terms of the charter, the City Council are vested "with full power and authority to make such assessments on the inhabitants of the City, or those who hold taxable property therein, for the safety, benefit, convenience and advantage of the said City, as shall appear to them expedient: *Held*, that the assessment of a tax, on the value of the real estate within the corporate limits, for the purpose of constructing a canal for the better securing an abundant supply of water for the City, is not a violation of the charter, or contrary to the laws of the State. *Frederick vs. The City Council.* 5 Ga..... 561
6. While the City Council of Augusta confines itself within the limits of the charter, to make police regulations under its own ordinances, it cannot be considered a Court subject to prohibition. *Mealing vs. The City Council.* *Dudley*,..... 221
7. The City Council have the power to establish and enforce such by-laws and ordinances, respecting the harbor and wharves, and every regulation that shall appear to them requisite for the security, welfare and convenience of the city. *Dubois vs. The City Council.* *Dudley.* 31

AUTREFOIS ACQUIT.

1. When a prisoner is put upon his trial, and a Jury empannelled and sworn for the purpose of trying him, a *nolle prosequi* cannot be entered without his consent. And if so entered, a plea of *Autrefois Acquit* will bar any subsequent indictment for the same offence. *Reynolds vs. The State.* 3 Kelly..... 56
2. When defendants, indicted jointly, sever on their trial, it is the privilege of the State's counsel to elect which shall be tried first; and where issue is joined upon a plea of *Autrefois Acquit*, by one defendant, before he announces himself ready for trial on the merits, and that issue is disposed of, this does not amount to an election by the State. *Studstill vs. The State.* 7 Ga..... 2

BAIL.

I. IN CIVIL CASES.

II. IN CRIMINAL CASES.

I. IN CIVIL CASES.

1. In *scire facias* against bail, where no plea had been filed, judgment may be rendered upon motion without the intervention of a Jury: *aliter*, where defence made. *Reed vs. Sullivan, Ex'r.* 1 *Kelly* 294. *Also, 1 Kelly*..... 316
2. The service of *scire facias* against bail in Georgia, is very much as in England; as for example, if the defendant cannot be found, return of two *nihilis* will authorize farther proceedings. If he fail to appear after service, or after return of two *nihilis*, or appearing, fails to plead, judgment may be entered up against him. *Ibid.* *
3. A *scire facias* against only one defendant as bail, issued by the Clerk of one County, and directed to the Sheriff of another, is bad, and will be quashed, upon motion. *Garvin vs. Gallagher.* 1 *Kelly*.....315—16
4. A *scire facias* against bail is not such an original suit, within the meaning of the Constitution of Georgia, as to require it to be instituted in the County of the bail's residence. *Ibid.*..... 316
5. When bail surrenders his principal during the session of the Court, it is his duty to have an *exoneretur* entered on the minutes of the Court, which will be the only legal evidence of his discharge. *Griffin vs. Moore.* 2 *Kelly*..... 334
6. According to the provisions of the Judiciary Act of 1799, the liability of bail in this State, is not absolutely fixed, until the plaintiff in the action obtains final judgment for his demand, and a *capias ad satisfaciendum* issues thereon, and the principal cannot be found, *scire facias* issues against the bail, which must be served twenty days before the Court, and judgment thereon: *Held*, that the bail has the right to surrender his principal, in discharge of his liability, at any time before final judgment on the *scire facias*, and that the death of the party between the return of *non est inventus* and final judgment on the *scire facias*, might be shown in discharge of the bail. *Ibid.*
7. A principal having given security on a bail process, may avail himself of a want of conformity between the amount indorsed on the writ,

- and the amount sworn to, by motion to discharge the bail. *Jennings vs. Sledge*. 3 *Kelly*..... 130
8. An indorsement on the writ, in a bail suit, of an amount larger than the sum sworn to, is contrary to the Statute, and the bail process in such case is void, and the bail discharged. *Jennings vs. Sledge*. 3 *Kelly* 130
9. It is not necessary in an affidavit to hold to bail, to set forth or describe the cause of action or the character of the debt. *Montigu vs. Leati*. 7 *Ga.*..... 366
10. Where a *scire facias* is issued on a bail bond against the principal and bail jointly, and the Sheriff returns "*non est*," &c. as to the principal, the creditor may proceed to enter up judgment against the bail. *Ford vs. Lane*. 8 *Ga.*..... 322
11. No assignment of the bail bond is necessary, by the Sheriff to the creditor, at whose instance the party was arrested. It inures to his benefit, under the Statute of this State, by operation of law merely. *Ibid.*
12. Where the affidavit to procure bail, stated that the plaintiff claimed a certain sum to be due him from the defendant: *Held*, a substantial compliance with the 13th section of the Judiciary Act of 1799. *Davidson et. al. vs. Carter & Ritch*. 9 *Ga.*..... 501
13. When the names of the sureties to a bail bond are inserted in the obligatory part of of the bond, but omitted in the condition: *Held*, that such omission did not alter the legal effect of the instrument. *Davidson et al. vs. Carter & Ritch*. 9 *Ga.*..... 501
14. For the purpose of fixing bail, the *ca. sa.* against the principal must be returned to the next succeeding term of the Court from which it issued. *Lichten & Baker vs. Mott*. 10 *Ga.*..... 138
15. No intermediate return is sufficient to fix the bail; neither can it be regarded as the return required by law. *Ibid.*
16. If the pleadings show the *ca. sa.* was *in fact* returned into the Clerk's office by the Sheriff, with an entry of *non est*, &c. thereon, several weeks before the term of the Court to which it is made returnable, it constitutes a good defence to the *scire facias* sued out against the bond. *Ibid.*
17. During the time that intervenes between the *teste* and *return* of the *ca. sa.* it must remain in the officer's hands, subject, if possible, to be executed. *Ibid.*

II. IN CRIMINAL CASES.

1. Where a felony of high grade was charged upon a prisoner, it rests in the sound discretion of the Court, whether he shall be admitted to bail : and where, on such a charge, the affidavits against him are very positive, and there are no extrinsic circumstances in his favor, bail will be refused. *State vs. Howell. R. M. Charl.*..... 120
2. Where it appears upon a charge of homicide, that there are favorable circumstances in the case, and there is a presumption that the prisoner has been guilty of manslaughter only, the Court will exercise its discretion by admitting bail. *The State vs. Wicks. R. M. Charl.* 139
3. The Judges of the Superior Court in Georgia, have a discretionary power (governed by the circumstances of the case) to bail in all cases whatsoever. *The State vs. Abbot. R. M. Charl.*..... 244.
4. It is not a sufficient ground for bail, that the verdict of the Coroner's Jury does not charge the prisoner with felonious homicide, if the affidavits and depositions taken by the Coroner and the committing Magistrate, taken in connection with the verdict, showed that a felony has been committed, or is charged. *Ibid.*
5. And where on such charge, it appears that the prisoner has confessed that the death was caused by him, he will not be bailed, unless there be circumstances of some special cause to induce it. *Ibid.*
6. Though the prisoner on his trial is entitled to have the whole of his confession given in evidence, if any part of it is offered, yet on application for bail, the exculpatory circumstances stated by him in such confession, will not be sufficient to sustain the application, unless supported by other testimony, or strong intrinsic presumptions of their truth. *Ibid.*
7. A person charged with felony, cannot make the omission of a public officer to prosecute at the succeeding term, a ground for bail, unless such omission has operated, or may operate oppressively. *Ibid.*
8. The condition of a recognizance, or bond to appear and answer to a criminal charge, at a given term of the Court, is not fulfilled by the principal's being present at that term ; the condition of such bond is not fulfilled by appearing and answering to the charge by pleading to it, but the accused must be and appear at the first term, and continue to appear, until he is permitted to go by leave of the Court had, or until he is acquitted, or otherwise legally discharged, or if convicted, until sentence is passed, in order to the fulfillment of the obligation

- of the bond, and the release of the securities. *Alexander et al. vs. The State.* 2 *Kelly*..... 138
9. A recognizance or obligation to appear and answer to a criminal charge, attested only by one not being a Magistrate, is not a recognizance technically, but is as good as a bond. *Ibid.*..... 139
10. Before bail in criminal case can be made liable, *the record* must show that the principal was called and did not appear. *Park vs. The State.* 4 *Ga.*..... 329
11. For appearance to answer a criminal charge before the Superior Court, it is a valid bond, though taken and tested by the Sheriff. *Park vs. The State.* 4 *Ga.*..... 329
12. Bail is usually *absolute* in the first instance; still, if the Magistrate has been deceived, or taken insufficient bail, he may require fresh security. To entitle the sureties in the second bond to their discharge, they must aver in their plea that the first bond was good and sufficient. And *quere*, whether this would be a good plea? *Spicer vs. The State.* 9 *Ga.*..... 49
13. A recital in the judgment of forfeiture, that the principal and bail were called and did not appear, in terms of their undertaking, is sufficient. *Ibid.*
14. The judgment need not specify the amount of the bond. *Ibid.*

BAILMENT.

1. In an action against a bailee, the question of negligence, is a question of law for the Court to determine. *Morel vs. Roe.* *R. M. Charl.* 19
2. But the facts from which it is, or is not inferred, must be found by the Jury. *Ibid.*
3. In contracts for conveying goods on freight, there is an implied undertaking by the carrier, that he has a competent knowledge of the navigation, and he will be liable for a loss occasioned by a want of such knowledge *Ibid.*
4. A factor's lien for a balance accrued in the life-time of his principal, does not attach to property coming into the factor's possession, after

- principal's death, by order of his representative. *Willy vs. King et al. Georgia Decisions, part II.*..... 7
5. One who contracts to transport goods from one point to another, and deliver them in good order and condition, unavoidable accidents only excepted, is not a common carrier, but is responsible on his contracts as one. *Fish vs. Chapman et al. 2 Kelly*..... 352
6. To make a person a common carrier, he must exercise it as a common employment; he must undertake to carry goods for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation *pro hac vice. Ibid.*
7. Unavoidable is synonymous with inevitable, and inevitable or unavoidable accidents are the same with the acts of God, which means, any accident produced by physical causes, which are inevitable, such as lightnings, storms, perils of the seas, earthquakes, sudden death, illness. *Ibid.*
8. A common carrier is in the nature of an insurer of the goods intrusted to his care, and is responsible for every injury sustained by them, occasioned by any means whatever, except only the act of God and the King's enemies. *Ibid.*
9. Nor can he vary his responsibility, by notice or special acceptance, such being void, as contravening the policy of the law; but he may require the nature and value of the goods to be made known to him, and may avail himself of any fraudulent acts or sayings of his employers. *Ibid.*
10. There is, on the part of the hirer, an implied obligation not only to use the thing hired with due care and moderation, but also, not to apply it to any other use, or detain it beyond the time for which it was hired. *The Mayor, &c. vs. Howard. 6 Ga.*..... 213
11. If the thing hired is used for a different purpose from that intended by the parties, or in a different manner, or for a longer period, the hirer is not only responsible for all damages, but if a loss occurs, even by inevitable casualty, he will generally be responsible therefor. *Ibid.*
12. The contract of hire being one of mutual benefit, the hirer is bound only for ordinary diligence, or for that care and diligence which the generality of mankind use in keeping their own goods of the same kind. *Ibid.*
13. In trover for a slave, the measure of damages, as a general rule, is the value of property at the time of the conversion, and the value of

- the hire of the negro since, up to the time of the trial. *Schley vs. Lyon et al. Trustee.* 6 Ga..... 530
14. In trover by a bailee against the general owner, the measure of damages is the value of his special property only, but where the action is against a stranger or wrong doer, the measure of damages is the full value of the property—the bailee holding the balance beyond his own interest, for the general owner. *Ibid.*
15. The storing of cotton with a warehouse-man, is a contract of bailment, and the receipt is the mere evidence thereof. *Smith vs. Picket.* 7 Ga..... 104
16. Where a warehouse-man gives a receipt for cotton stored by A, in which he promises to deliver the cotton to A, or the bearer of the receipt, and is subsequently served with a summons of garnishment by a creditor of A: *Held*, that he is not relieved from liability by the delivery of the cotton to the holder of the receipt, to whom it was transferred after the service of the garnishment. *Ibid.*
17. A, as the agent of B, deposits a sum of money with C, with request that he will keep it until B returns home, (he being absent from the State,) and then pay it to him, which C agrees to do: *Held*, that C is a depository, and not liable to be sued by B for the money until after a request. *Montgomery, Adm'r, &c. vs. Evans.* 8 Ga..... 173
18. The Macon and Western R. R. took on board their cars, the slave of H, having a general pass, and without the knowledge and consent of H, to transport him to a given point, for the usual fare for negroes: *Held*, that this was a conversion of the slave, and that the company are liable for all the injuries which he received, whether they occurred by the negligence of the company or otherwise. *The Macon and Western R. R. Co. vs. Holt.* 8 Ga..... 157

See *Collateral Security.*

BANKRUPT LAW OF THE UNITED STATES.

1. If a bankrupt fails to plead his discharge in bar to a suit pending against him, at the time it is obtained, a Court of Equity will not avoid the judgment so as to render his discharge available. *Bellamy & Co. vs. Woodson.* 4 Ga..... 175
2. According to the provisions of the Bankrupt Law of 1841, when a

bankrupt has obtained his certificate of discharge, under that Act, it is conclusive evidence of itself, of such discharge from all debts, contracts, and other engagements, existing at the time of such discharge, unless impeached for fraud. *Blake vs. Bigelow et al.* 5 Ga..... 437

3. The Court declined expressing any opinion as to the validity of the Bankrupt Law of 1842, it being unnecessary to the decision of the cause. *King vs. The Central Bank.* 6 Ga..... 257

4. It is not a valid defence for an indorser, that the maker has been discharged under the Bankrupt Law. *Ibid.*

5. Under the Bankrupt Act of 1841, when a discharge is sought to be attacked for fraud, a prior reasonable notice is required to be given, specifying the grounds of fraud; and the notice may be amended at any time before the final trial, provided a sufficient time elapse to enable the bankrupt to prepare to rebut it. *Flournoy vs. Newton.* 8 Ga..... 306

6. The transfer of his effects by a bankrupt, in contemplation of bankruptcy, is a fraud upon the law. *Ibid.*

7. A bankrupt may appropriate so much of his effects as may be necessary to raise the means to maintain his application in bankruptcy. *Ibid.*

8. A certificate of bankruptcy may be attacked and opened in a State Court, when it impedes or conflicts with the rights of a party litigating there, so far as that party's rights are concerned. *Bond vs. Baldwin.* 9 Ga..... 9

9. Upon the trial of a claim, upon an issue between the claimant and the plaintiff in execution, upon the question of fraud in procuring a discharge in the Bankrupt Court by the defendant in *fi. fa.* the mercantile books of a firm of which the defendant in *fi. fa.* was a member before his application, are admissible to show that he was the owner of an interest in that firm not returned in his schedule. *Ibid.*

10. All the acquisitions of a bankrupt, made after the filing his petition in bankruptcy, are exempt from liability to pay debts previously contracted. *Ibid.*

BANKS AND BANKING.

1. If the capital of a bank cannot be usefully employed in loans, there can be no objection to investing a portion thereof in the purchase of its own stock; and the directors of the bank have a right to dispose of the stock so purchased by them. *Hartridge et al. vs. Rockwell et al. R. M. Charl.*..... 260
2. And on the re-sale of such stock, the stockholders of the bank have no right to a preference in the purchase. *Ibid.*
3. The managers or directors of the affairs of a corporation, cannot be considered as trustees, or prohibited as such, from the purchase of the trust property or stock, belonging to the corporation. *Ibid.*
4. By the thirteenth section of the charter of the Western Bank of Georgia, it is declared, "that said corporation shall not, at any time, suspend or refuse payment in gold or silver, of any of its notes, bills or obligations, and if the said corporation shall, at any time, refuse or neglect to pay, on demand, any bill, note, or obligation, issued by the corporation, according to the contract, promise or undertaking, the charter hereby granted shall be forfeited," &c. And by the twentieth section of the charter, it is provided, "that all transfers of stock in said bank shall be wholly void, if made within six months previous to the failure of said bank," &c. A refusal, therefore, of the bank to redeem its notes, bills, obligations, &c. was such a failure in the contemplation of the charter, as to make void all transfers of stock made within six months previous to such refusal, and to render the stockholders, so transferring, liable for the debts of the institution, notwithstanding such transfer. It was not necessary that the insolvency of the bank should have been judicially ascertained, to establish the fact of a failure, within the meaning and intention of the Legislature. *Lumpkin et al. vs. Jones. 1 Kelly*..... 30
5. Though the temporary suspension of specie payments in the year 1838, was, in the meaning of the charter, a failure of the bank, yet a subsequent resumption, in pursuance of the Act of 18th December, 1840, which was intended to relieve the suspended banks from the liabilities they had incurred, under their charters, on account of their failure to redeem their liabilities in gold and silver, cured that failure so as to affect the rights of the parties in the sale of stock. *Ibid.*.... 31
6. A bank is liable upon bills of exchange, checks and drafts, drawn and endorsed by its cashier, notwithstanding the clause in the charter, requiring the signature of the president and counter signature of the

- cashier, to any contract or engagement whatever, before the funds of the bank should be liable therefor. *Merchants' Bank vs. Central Bank*. 1 *Kelly*.....430-1
7. The Act of 1840, which provides for the appointment of a receiver of assets of banks which had forfeited their charters, and the Acts amendatory thereof, are remedial in their character and do not contravene the provisions of the Constitution, with reference to the obligation of contracts. *Hall et al. vs. Carey, Assignee*. 5 *Ga.*..... 239
8. Notice to the cashier of the bank, by the surety, to sue the principal, is a sufficient notice to the bank, especially where it appears that the bank acted upon such notice. *Bank of St. Mary's vs. Mumford et al.* 6 *Ga.*..... 44
9. A bank, when holder of a promissory note, is within the provisions of the Act of 1831, authorizing sureties to give notice to sue. *Ibid.*
10. The Bank of Columbus made an assignment of its effects, and its charter was afterwards forfeited by a judgment of the proper Court, at the instance of the State. The Legislature, subsequent to the forfeiture, affirmed the assignment, and placed the assignee upon the footing of a receiver. In a suit by the holder of the bills of the bank against the assignee: *Held*, that a demand of payment of the bills, made by the plaintiff on the receiver, after the forfeiture, did not entitle him to recover *ten per cent.* damages under the Act of 1832. *Carey, Assignee, vs. Greene*. 7 *Ga.*..... 79
11. The Act of 1837, making it penal in a bank to put any instrument in circulation, payable at a longer date than three days, applies to *post notes* only. *Carey, Assignee, vs. McDougald*. 7 *Ga.*..... 84
12. The provision to be found in the various bank charters of this State, requiring all contracts whatever to be signed by the president and countersigned by the cashier, in order to bind the company, does not apply to such dealings and transactions as are usually and necessarily performed by the cashier, or some other duly authorized agent. *Ibid.*
13. The mere existence of cross demands, will not be sufficient to justify a set-off in Equity. A debtor to a bank for borrowed money, cannot set-off against his note or a judgment recovered thereon, the dividend that will be coming to him as a stockholder in the company when its affairs are wound up. A set-off is invariably allowed in Equity, only when the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand. *The Ruckersville Bank et al. vs. Hemphill et al.* 7 *Ga.*..... 396
14. Where the rights of a party plaintiff depend upon the facts, that an

- assignment was made by a bank to the defendant, and that he accepted it, the plaintiff must prove them, notwithstanding they are recited in a public Act of the Legislature. *Dougherty vs. Bethune, Assignee.* 7 Ga..... 90
15. In a suit by a bank, the defendant having introduced the books of the bank in evidence: *Held*, that he cannot impeach the books as a whole, but may show that particular items in the books are wrong, and disprove them, and that by mistake or fraud, they have been improperly kept. *The Merchants' Bank vs. Rawls, Adm'x, et. al.* 7 Ga.... 191
16. In an action against the assignee of a bank, a plea that there never was an assignment made to him, and a plea that defendant is not the assignee of the bank, are pleas in bar of the action. *Dougherty vs. Bethune.* 7 Ga..... 90
17. A bill, by the creditors of an insolvent corporation, alleging a fraudulent combination and collusion between the assignee and debtor of the institution, to injure and defeat the creditors, make a proper case for the interposition of a Court of Equity. *Stocks et al. vs. Leonard et al.* 7 Ga..... 511
18. Where the charter of a bank renders the stockholders liable after the transfer of stock, unless sixty days' notice of the sale is given in one of the public gazettes of this State, and provided the transfer is made six months before the failure of the corporation, all stockholders who have given notice, in terms of the Act, are exempt, unless the failure occurs within six months thereafter: all other stockholders are liable for the redemption of the bills, whether they have transferred or not. *Lane vs. Morris.* 8 Ga..... 468
19. The notice of the sale by the stockholder need not specify the name of the purchaser. *Ibid.*
20. A suspension and failure to pay specie on demand to bill-holders generally, is sufficient to enable the bill-holder to sue. He need not prove a special demand in his case. *Ibid.*
21. The right given the bill-holders to go upon the stockholders for the ultimate redemption of the bills, is independent of any claim upon the assets of the corporation; one which may be asserted directly in his own name, and which the assignee or receiver could not enforce, as it constitutes no part of the effects of the bank. *Ibid.*
22. At Common Law, upon the dissolution of a banking corporation, the debts due to and from it are extinguished. *Hightower vs. Thornton.* 8 Ga. 486
23. The individuals who compose a corporation, may by contract or in law, incur liabilities, during its existence, which will survive the charter. *Ibid.*

24. Unpaid subscriptions to the capital stock of a bank are corporate property, which can be reached by the creditors in a Court of Equity ; and this right exists entirely independent of any statutory provision. *Ibid.*
25. A Court of Equity will provide a remedy to enable the creditors to appropriate this trust fund. *Ibid.*
26. The doctrine of *Dr. Salmon's* case (1 *Cas. in Ch.* 204) questioned. *Ibid.*
27. Legislative Acts, as well as decrees of Courts, of late years, evince a sounder and purer morality with regard to the liability of moneyed corporations. *Ibid.*
28. It is the amount of shares subscribed, and not the sums actually paid in, which constitute the capital stock of a bank. *Ibid.*
29. The subscription for stock is a debt which the corporation may call in to satisfy the creditors. *Ibid.*
30. The equity of the creditor is equally strong where the stockholder has contracted to pay (and failed to do so) his portion of the capital stock, as where it has been paid in and afterwards withdrawn. *Ibid.*
31. The right to have the unpaid stock drawn in to extinguish outstanding debts, is as strong *after* as *before* the dissolution of the corporation, *Ibid.*
32. In *South Carolina*, stockholders held liable beyond the amount of their capital stock, unless restricted by the charter. *Ibid.*
33. There is no distinction to be drawn in this respect, between moneyed corporations and railroad and manufacturing companies. If any exists, it is *against the former*. *Ibid.*
34. A periodical madness seems to pervade every section of the country in the business of banking ; leading necessarily to over-issues and consequent depreciation. It is the duty of the Government to guard against this mischief ; and the regulations provided by law for this purpose, instead of being relaxed, should be rigidly enforced by the Courts. *Ibid.*
35. The provision in *this charter* for the forfeiture of the stock, is for the *benefit* of the corporation, to coerce punctuality in the payment of instalments, and in case of failure to afford to the company a speedy method of converting the stock into cash, and was not intended as a privilege to the stockholder to abandon his subscription. *Ibid.*

36. The power to sell the stock of a delinquent stockholder is a cumulative remedy, and does not impair the right to compel payment by action. *Ibid.*
37. This being a case of pure, direct, and technical trust, not cognizable at law, is not subject to the provisions of the Statute of Limitations. *Ibid.*
38. The Legislature having recognized and ratified the appointment of an assignee, made by the stockholders before the forfeiture of their charter, the duty of calling in the unpaid stock to discharge debts devolves properly upon him. *Hightower vs. Thornton.* 7 Ga..... 486
39. If he, fraudulently combining with the stockholders, neglects or refuses to do his duty, the proceeding may be maintained directly by the creditor, in his own name, against the stockholders, making the receiver a party defendant to the case. *Ibid.*
40. Creditors of an insolvent corporation, whose charter has been forfeited, and who have exhausted their legal remedy against it, may sue in Chancery for the assets of that corporation, and have them applied in payment of their debts. *Hightower et al. vs. Mustian.* 7 Ga., 506
41. An assignment of assets by a bank (insolvent at the time, and about making a general assignment, and against which proceedings are pending to revoke its charter,) made to a creditor cognizant of these things, and by collusion with him to defraud the other creditors: *Held*, to be void, and the assets so assigned is a trust fund, to be applied to the payment of the debts of the corporation. *Ibid.*
42. A bill is filed by the assignee of a bank against a number of the stockholders of another insolvent bank, to compel them to contribute rateably, under a clause in the charter, which makes them personally liable for the bill in circulation, and also to appropriate the amount of stock subscribed by them, and unpaid, to the payment of the debt due by the latter institution to the former, as a trust fund in their hands, and is demurred to, upon the ground that the complainant has an adequate Common Law remedy: *Held*, that the demurrer is not well taken. *Robinson et al. vs. Carey, Assignee.* 8 Ga..... 527
43. Such a bill is not demurrable, on the ground that the liabilities of the stockholders is several and not joint. *Ibid.*
44. The constitutionality of the Acts of the Legislature of 1832—3, authorizing the Governor to appoint a receiver, to take charge of the assets of the Bank of Macon, and clothing him with power to maintain all suits, &c. affirmed. *Carey, Assignee, vs. Giles.* 9 Ga..... 253

45. The appointment of a receiver by the Legislature, to settle the affairs of an insolvent Bank is not a Judicial Act. *Ibid.*
46. In an action brought by a bill-holder against a stockholder, under the 11th section of the charter incorporating the Planters' & Mechanics' Bank of Columbus, for the ultimate redemption of the bills issued by the bank: *Held*, that the stockholder was only liable to pay interest on the bills from the time of demand of payment thereof, made by the bill-holder of the stockholder, and not from the time of demand on the bank. *Lane vs. Morris.* 10 Ga. 162
47. In an action by a bill-holder against a stockholder, founded upon the 11th section of the charter, which declares that the persons and property of the stockholders shall be pledged and held bound, in proportion to the amount of shares and the value thereof, which each individual may hold in said bank, for the ultimate redemption of the bills or notes: *Held*, that the value of the stock was to be estimated according to the valuation placed upon it by the 2d section of the charter: viz. one hundred dollars. *Ibid.*
48. The cashier of a bank may do, independently of a board of directors, whatever properly appertains to his office; and one of these acts is to pay the debts of the bank, by a transfer of negotiable securities. It is not, therefore, competent to show that such a transfer is void, by proof that it was made after the board of directors had resigned, and when the presidency of the bank had been assumed by a person who was neither an officer or director: *Held*, farther, that such a transfer, made under such circumstances, is valid in law, but that it is admissible to prove these facts upon an issue of fraud, *in fact, or not.* *Carey, Assignee, et. al. vs. Giles, Receiver.* 10 Ga. 9
49. An assignment made by an insolvent bank, to pay an existing debt to a creditor, is not void in law, by the General Law, or under the Act of 1818, because the amount of effects assigned is larger than would be reasonably sufficient to pay the debt, and because there is a stipulation that the excess shall be returned to the bank. *Ibid.*

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BANK BILLS, CHECKS AND POST NOTES.

1. A party who proves the loss of a bank note, is entitled to have the same established as a lost paper, by pursuing the method prescribed by the rule of Court, and to require payment of said established note from the bank from whence it issued. *Waters vs. Bank of Georgia et al. R. M. Charl.* 193

2. But he will be compelled, before payment of the same, to indemnify the bank from all liability on the original note. *Ibid.*
3. The setting apart of bank bills, as a pledge or security, by a banking company, is not an issuing of such bills as currency. *Collins vs. Central Bank et al.* 1 *Kelly*. 460
4. If the holder of a bank check neglect to present the same for payment within a reasonable time, and the bank fail in the meantime, the drawer is discharged from liability, to the extent of the injury he has sustained by such failure. *Daniels vs. Kyle and Barnett.* 5 *Ga.*. 245
5. The same doctrine applies to all holders, whether payees or transferees. *Ibid.*
6. The Bank of Columbus made an assignment of its effects, and its charter was afterwards forfeited by a judgment of the proper Court, at the instance of the State. The Legislature subsequent to the forfeiture, affirmed the assignment, and placed the assignee upon the footing of a receiver. In a suit by the holder of the bills of the Bank against the assignee: *Held*, that a demand of payment of the bills, made by the plaintiff on the receiver, after the forfeiture, did not entitle him to recover ten per cent. damages, under the Act of 1832. *Carey, Assignee vs. Green.* 7 *Ga.*. 79
7. The Act of 1837, making it penal in a bank to put any instrument in circulation, payable at a longer date than three days, applies to post notes only. *Carey, Assignee, vs. McDougald.* 7 *Ga.*. 84
8. In suing on bank bills, it is not necessary to describe them by setting forth the numbers and letters. *Carey, Assignee, vs. Green.* 7 *Ga.*. 79
9. When the value of depreciated bank bills at a particular time, is to be proven, the proof should apply, with reasonable certainty, to that time, and hearsay cannot be admitted to prove their value. *Bethune vs. McCleary.* 8 *Ga.*. 114
10. Where the charter of a bank renders the stockholders liable after the transfer of stock, unless sixty days' notice of the sale is given in one of the public gazettes of the State, and provided the transfer is made six months before the failure of the bank, all stockholders who have given notice are exempt, unless the failure occurs within six months thereafter. All other stockholders are liable for the redemption of the bills, whether they have transferred or not. *Lane vs. Morris.* 8 *Ga.* 114
11. The notice of the sale by the stockholder need not specify the name of the purchaser. *Ibid.*

12. A suspension and failure to pay specie on demand, to bill-holders generally, is sufficient to enable the bill-holder to sue. He need not prove a special demand in his case. *Ibid.*
13. The right given the bill-holders to go upon the stockholders for the ultimate redemption of the bills, is independent of any claim upon the assets of the bank; one which may be asserted directly in his own name, and which the assignee or receiver could not enforce, as it constitutes no part of the effects of the bank. *Ibid.*
14. A bank bill, issued by an institution, taking its franchise from State authority, for the mere legal conveniences of a corporate body, is not a bill of credit, within the inhibition of the Constitution of the United States. *The State vs. Calvin et al. R. M. Charl.*..... 151

BARON AND FEME. See *Husband and Wife*.

BASTARDS AND BASTARDY.

1. In an indictment under the 26th section, 11th division of the Penal Code, for bastardy, it is necessary to charge distinctly that the defendant is the father of the bastard child. *Locke vs. The State. 3 Kelly* 535
2. The facts that the defendant is the father, and that he has failed or refused to give the bond in pursuance of law, for the education and maintenance of the child, constitute the offence. *Ibid.*..... 539
3. An indictment is sufficient, which charges the defendant with being the father of the child, and that he refused to give bond, when required to do so *in terms of the law*. *Walker vs. The State. 5 Ga.*..... 491
4. A bastardy warrant reciting that the defendant has been charged, upon the examination of a single woman, with being the father of a bastard child, is admissible in evidence to *prove the arrest*, although it does not specify that he was brought before the Justice to give security, &c. *Ibid.*
5. Where the General Assembly by an Act declare, "that the name of S. J. Wells be changed to S. J. Rakestraw, and that she be declared legitimate and capable of inheriting, and like privileges in law as if she had been born in lawful wedlock: *Held*, that inasmuch as the illegitimate child was not, by the Act, made legitimate to any particular

- person, the only effect of it was to change the name. *Edmondson and Wife vs. Dyson*. 7 Ga..... 512
6. Bastards may be made legitimate and capable of inheriting, by an Act of Parliament. The Legislature of Georgia possesses the same power. *Beall, Adm'x, vs. Beall and Beall*. 8 Ga..... 210
7. When an Act of the Legislature is passed, legitimating W and E to A B, their reputed father, and authorizing them to inherit from him, his assent will be presumed, more especially when the reputed father lives five years after the law is passed. *Ibid.*
8. While it is true, that too much countenance ought not to be given to the indulgence of criminal desire, nor encouragement to the increase of spurious offspring, still that policy may well be doubted, which would reject all provision for illegitimate children, and suffer them to be cast naked and destitute upon the world. *Ibid.*
9. Illegitimacy will be viewed with much less favor in criminal proceedings, than in mere questions of property and succession. *Ibid.*
10. Virginia, and many other States of the Union have, by Statute, adopted the rule of the Civil, in opposition to that of the Canon and Common Law, whereby ante-nuptial children are legitimated by the subsequent marriage of the parents, and the recognition by the father. *Ibid.*
11. Courts and Judges, eminent for their learning, have regarded bastards as having strong claims to equitable protection. *Ibid.*
12. There is a growing tendency every where, and especially in this country, to relax the ancient rigor of the law in respect to bastards, and to look to the Penal Code and to the guilty parties for the prohibition and prevention of fornication and adultery, rather than visit the vengeance of the law upon the innocent heads of the unfortunate offspring. *Ibid.*
13. The law, in its humanity, will not deny to those who have been the authors of their disgrace, the power to repair the mischief, as far as they can, by gift, will or legislative enactment. *Ibid.*
14. An Act, legitimating bastards, is purely legislative in its character, and not prohibited by the Constitution, and which should not only be supported, but construed favorably by the Courts. *Ibid.*

BEQUEST. See *Devise and Legacy*.

BILLS OF EXCEPTIONS.

1. The constitutional writ of *certiorari* is applicable to the errors of inferior jurisdiction, contra-distinguished from the "Inferior Court"—the judicial writ of *certiorari* is alone applicable to the "Inferior Courts" as before distinguished. *Ex parte, Simpson. R. M. Charl...* 111
- 2 The necessity of exceptions and 20 days' notice, applies only to the judicial writ. *Ibid.*
3. It seems, that if a party seeks to avail himself of an error of the Court, so as to carry up his case by *certiorari*, he must reduce his exceptions to writing at the time, and tender them during trial. *Dow, Taylor & Co. vs. Goldsmith. R. M. Charl.....* 288
4. And where no exceptions have been tendered during the term, but were presented to the individuals composing the Court separately, and on a succeeding day, and were thus signed by them, and such exceptions were contradicted by a statement signed by the same Judges, the rule was refused "upon the great irregularity of the proceedings." *Ibid.* 288
5. It is not necessary that exceptions should be taken in the Court below, in order to bring up a decision of a Court of Ordinary. *Baser vs. Marlow et al. R. M. Charl.....* 542
6. The bill of exceptions must be drawn up by the party or his attorney, within the time prescribed, and must be certified and signed by the presiding Judge, within that time. *Doe ex dem. Truluck vs. Peeples et al. 1 Kelly.....* 2
7. The certificate of the Judge below, being without date, the Court will presume in favor of public officers, in the absence of all proof to the contrary, that they discharge their duty in compliance with the law. *Ibid.*
8. The errors complained of should be plainly and distinctly specified in the bill of exceptions. *Ibid.*
9. The giving of bond and security, upon the carrying up of cases to the Supreme Court, is optional, not compulsory. *Ibid.*
10. The bill of exceptions will operate as a *supersedeas* only where bond and security has been given, or affidavit filed, in conformity with the Act organizing the Supreme Court. *Ibid.*

11. Where no bond has been given, or affidavit filed, the opposite party is at liberty to proceed to enforce his rights, in the Court below, by execution or otherwise. *Ibid.*
12. The Supreme Court will not take cognizance of any testimony whatever, that is not certified up according to law. *Smith vs. Kershaw.* 1 *Kelly*..... 260
13. Bill of exceptions not having been signed by the presiding Judge within four days after the trial below, case will be dismissed upon motion.
See title *Writ of Error, Smith, Adm'r. vs. Burn et al.* 2 *Kelly*..... 263
14. Testimony on trial below, not embodied in the bill of exceptions, case will be dismissed. *Ibid.*
15. Where the bill of exceptions to the decision of the Court below, on a demurrer to a bill of review, was duly certified by the presiding Judge thereof, which contained a clear statement of the points made and decided by him on the demurrer, as well as the grounds of the decision, it was *Held*, the formal order overruling the demurrer, and the special reasons of the Court below for its judgment, were not indispensably necessary to the hearing of the case in the Supreme Court. *Carey, Assignee, vs. Rice, Receiver.* 2 *Kelly*..... 407
16. General rules concerning. *Tarver vs. Rankin.* 3 *Kelly*..... 213
17. Where the bill of exceptions does not embrace the material facts upon which the judgment of the Court below was rendered, and which are indispensably necessary to enable this Court to review the judgment of the Court below, the writ of error will be dismissed. *Cowles & Ward vs. Clark.* 2 *Kelly*..... 382
18. May be taken and tendered at any time within the thirty days prescribed by law. *Carey, Assignee, vs. Alexander, Judge.* 4 *Ga.* 609
19. Where the evidence is sufficiently set forth in the bill of exceptions, to enable the Court to understand and decide the points of law excepted to, the writ of error will not be dismissed. *Adams, Adm'r, vs. Barrett.* 5 *Ga.*..... 404
20. The writ of error will be dismissed, if no original notice of the signing and certifying of the bill of exceptions is filed, as required by the Statute, nor will an acknowledgement of service of a copy notice of the filing of the bill of exceptions, be considered as a compliance with the Statute. *Anderson vs. The Darien Bank.* 5 *Ga.*..... 582
21. If the bill of exceptions bears date previous to the trial of the cause,

- and there is nothing in the record by which it may be amended, the writ of error must be dismissed. *Perry & Peck vs. Higgs.* 6 Ga..... 43
22. If thirty-five days intervene between the signing the bill of exceptions and the suing out and serving the writ of error, citation and notice, the writ of error will be dismissed. *Ibid.*
23. Where the bill of exceptions is signed and certified only eight days before the session of the Supreme Court for that judicial district, the writ of error should be made returnable to the next succeeding term for that district, such being the first term, within the meaning of the amended Constitution. *Chapman vs. Stiles.* 6 Ga..... 113
24. Notice of the filing of a bill of exceptions is not sufficient; it must be notice of the signing and certifying. *Duke, Adm'r. vs. Trippe.* 6 Ga..... 380
25. The errors complained of below, must be specified in the bill of exceptions. *Weathers vs. Doster.* 6 Ga..... 227
26. If no notice of the signing and certifying of the bill of exceptions is served on the opposite party, and filed, as the law directs, the writ of error will be dismissed. *Haygood, Adm'r, vs. Neal.* 6 Ga..... 452
27. The assignment of errors cannot enlarge the bill of exceptions, but must be superseded by it. *Smith et al. vs. Mitchell.* 6 Ga..... 458
28. The notice of the signing of the bill of exceptions, must be signed by the party or his counsel. *Ibid.*
29. It must affirmatively appear, either by the certificate of the presiding Judge, or the transcript of the record, that the bill of exceptions was signed and certified within thirty days from the adjournment of the term in which the cause was heard. *Cloudis vs. The Bank of Tennessee.* 5 Ga. 481. *Russell et al. vs. March.* 6 Ga..... 491
30. It must appear that the bill of exceptions was filed in the Clerk's office of the Court below. *Ibid.*
31. The fact must appear affirmatively, that the bill of exceptions was signed within the time prescribed by the Statute. *Justices, &c. vs. Barrington.* 6 Ga..... 578
32. The notice required by the Act of 1845, is of the signing, not the filing of the bill of exceptions. *Laramore vs. Christian's Ex'rs.* 7 Ga 59
33. When the Clerk of the Superior Court certifies that he sent up the original notice, together with the bill of exceptions, &c. and it is not

- found, it will be presumed to be lost in its transmission, and after suitable proof, a copy may be established. *Jefferson vs. The Mayor, &c.* 7 Ga..... 181
34. An acknowledgment of service of the "bill of exceptions, citation, and notice of the *filing* of the *citation*," is not a compliance with the Statute requiring notice of the *signing* of the *bill of exceptions*. *Ibid.*
35. The notice of the signing of the bill of exceptions, must be filed in the Clerk's office of the Court below. *Wells vs. Hasty.* 7 Ga..... 153
36. The record of the cause should contain in itself, and without reference *aliunde*, all the papers, exhibits, depositions, &c. which were given in evidence in the Court below, and which are necessary to the hearing in the Supreme Court. *Stubbs vs. The Central Bank.* 7 Ga.... 258
37. If the admission of improper evidence is assigned for error, the substance of it must be set out. If it was not material, its rejection was no ground of error. *Ibid.*
38. The rule of Court requires that a brief of the oral, and a copy of the written evidence, shall be "embodied in" the bill of exceptions. It is not regular, therefore, to annex it to the bill of exceptions, and refer to it as an exhibit, particularly, unless the identical document receive the authoritative stamp of the presiding Judge. *Ibid.*
39. The Act organizing the Supreme Court, requires that the bill of exceptions should be true and consistent with what transpired in the cause. To comply with the Statute, it should contain the *whole* truth, or at least so much thereof as is necessary to the proper hearing of the cause in error; and if it is defective in this respect, the presiding Judge will be justified in refusing to certify and sign it. *Ibid.*
40. Only so much of the record of the proceedings of the Court below need be filed in this Court, as is *necessary* to a proper hearing and determination of the cause. *Killen vs. Sistrunk.* 7 Ga..... 281
See also, *Papot vs. Gibson.* 7 Ga..... 529
41. Service of the notice of the signing of the bill, by the plaintiff in error, *in person*, is not in compliance with the Statute organizing the Supreme Court. *Henderson vs. Henderson.* 7 Ga..... 421
42. The Supreme Court has no power to alter or amend the bill of exceptions. *Harrington, Adm'r, vs. Roberts and Wife.* 6 Ga..... 510
43. The Supreme Court will hear a cause upon a case made. *Papot vs. Gibson.* 7 Ga..... 529

44. The writ of error will be dismissed, if more than ten days intervene between the filing of the original notice and the certifying of the transcript of the record. *Crawford, Governor, &c. vs. Perryman.* 7 Ga. 558
45. Under the Act of February, 1850, all defects in the bill of exceptions, writ of error and citation, may be amended instanter, and without costs, in conformity with the record of the cause below. *Higgs vs. Huson.* 8 Ga. 317
46. After a bill of exceptions has been signed and certified by the Judge of the Superior Court, and filed with the Clerk, his control over it is at an end. *Heard vs. Heard.* 8 Ga. 880
47. Under the Acts of February, 1850, the original bill of exceptions must remain in the Clerk's office below, and a copy transmitted to the Supreme Court, as a part of the transcript of the record, or accompanying the same, and if this is not done, the cause will be stricken from the docket. *Ibid.*
48. Where the Clerk of the Superior Court sent up the original, instead of a copy of the bill of exceptions: *Held*, that the matter could not be relieved by suggesting a diminution of the record. *O'Neal et al. vs. O'Neal.* 8 Ga. 439
49. The brief of the evidence filed on a motion for a new trial, is not a part of the record to be transmitted to the Supreme Court, and it does not dispense with the necessity of incorporating in the bill of exceptions a brief of the oral and copy of the written evidence. *Wetmore vs. Cleavers.* 9 Ga. 546

BILLS OF EXCHANGE.

1. J. E. W. one of the mercantile firm of J. E. W. & Co. of Savannah, (whose commercial house was in Liverpool,) whilst in the latter place, drew his individual bill in favor of the plaintiff, on his house in Savannah, who accepted the same, but afterwards suffered it to be protested for non-payment: *Held*, that the payees of said bill were entitled to take out process of attachment against the individual estate of the non-resident drawer, as drawer, in addition to the remedy by action against the firm of J. E. W. & Co. as acceptors. *Richardson et al. vs. White. R. M. Charl.* 58
2. The payee or indorsee of a bill of exchange, may, in default of pay-

ment, sue all the parties to it at the same time, and an action against one will not debar his remedy against the others. *Ibid.*

3. And such payee or indorsee may maintain his action against the drawer, without previously suing the acceptor. *Ibid.*
4. The master of a vessel consigned to G, wrote a letter by H, the pilot who carried the vessel out, informing G that the ship had crossed the bar in safety, and requesting G to pay H \$35, the amount of pilotage due, "and oblige your obedient, &c." H indorsed on the letter—"Pay to L, or order." D, a creditor of H, sued him, and garnisheed G, (as the creditor of H) who returned under oath that previously to such garnishment, L had presented such letter, indorsed as above, and that he (G) had promised to pay the amount to L. *Quere?* if such letter was a bill of exchange, or an order in the nature of a chose in action. *Dibble vs. Gaston. R. M. Charl.*..... 444
5. *Held*, that if considered as a bill of exchange, the indebtedness of G, as acceptor, created a liability to L, the then holder, and not to H, who had parted with his interest in it. *Ibid.*
6. *Held*, also, that if it was a chose in action, the indebtedness of G, was created only by his promise, and that this being made to L, produced a privity of contract between G and L only, and that therefore G had never been the debtor of H. *Ibid.*
7. In suit upon bill, note, or other instrument, appearing upon its face to have been altered, the plaintiff is not required to produce evidence to explain it, where it is declared upon, as altered, unless the same is denied by the defendant on oath, under the Judiciary Act of 1799. *Tedlie vs. Dill. 2 Kelly.*..... 131
8. By the Statute of 26th Dec. 1826, notice of the non-acceptance of a foreign bill, drawn and indorsed in this State, and not payable at a chartered Bank, is not necessary to bind the indorser. *Hartridge vs. Wesson. 4 Ga.*..... 101
9. A party who acquires title to a bill or note before due, but with express notice of a defect or incumbrance, is so far identical with the previous owner, that his declarations or admissions while owner, may be received in evidence against such party. *Glantou vs. Griggs. 5 Ga.* 420
10. One who buys a note, bill, or other negotiable security, *bona fide*, and for value, after it is due from one who has no title to it, acquires no title against the true owner. *Thomas, Adm'r, vs. Kinsey. 10 Ga.*.. 421
11. Where a bill is indorsed to A B, cashier of the Bank of Augusta: *Held*, that A B might sue in his own name, or the bank may sue, and a suit in the name of A B, cashier, &c. is a suit by A B, individually. *Davis, Cashier, vs. Byrne. 8 Ga.*..... 329

12. In an action by an indorser of a foreign bill against the drawer, it is necessary to aver notice of the dishonor of the bill, or that which the plaintiff relies on as an excuse for not giving notice; also, to aver a protest for non-payment or an excuse for not protesting. *Ibid.*
13. It is not necessary to present a foreign bill for acceptance, when it is payable at a time certain. *Ibid.*
14. When the holder of a bill of exchange, without showing his title thereto, by an indorsement from the person to whose order it was payable, relied upon a promise to pay it by the drawer, in a count containing these facts, and setting forth the bill and the promise: *Held*, that the promise is without consideration and void, there being no privity between the plaintiff and the defendant. *Ibid.*
15. The indorsee of a bill or note before due, cannot be affected by the frauds or transactions between the original parties, unless he takes with notice. *Smith vs. Floyd and Roe. T. U. P. Charl.*..... 253

See *Banks and Banking*, 6; *Guaranty*, 1; *Promissory Notes*.

BILL OF PARTICULARS.

1. A general declaration for goods, wares and merchandize, without a bill of parcels, is bad. *Martin vs. Adm'r of Tyffe. Dudley*..... 17
2. And when the account sued on was a single item, charged in the books thus: "Bills receivable to merchandize," and a verdict has been rendered for plaintiff, the Court granted a new trial, declaring that the entry was too general to prove the sale and delivery of any particular goods; and although the defendant had waived the bill of parcels, plaintiff must prove particular items. *Ibid.*
3. A declaration, with the common counts for money had and received, and for money paid, laid out and expended, without specification by bill of particulars, or otherwise, on what account specially it was received or paid out, is defective, but it is such a defect as is amendable, and being cured by a verdict, is not good in arrest. *Dill et al. vs. Jones. 3 Kelly*..... 81

BLACK ACT, 9 GEORGE I.

Held, not to be in force in Georgia. *The State vs. Campbell. T. U. P.*
Charl 166

BONDS.

- I. GENERALLY.
- II. OFFICIAL BONDS.
- III. BOND FOR TITLES TO LAND.
- IV. INJUNCTION BONDS.
- V. SUITS ON BONDS, PARTIES, &c.

I. BONDS GENERALLY.

1. The obligor of a bond can, in no case, be permitted to take advantage of the omission of conditions, where the omission is beneficial to himself. And where the conditions omitted are onerous to the obligor, they shall not be permitted to charge him. *Justices of the Inferior Court vs. Wynn. Dudley*..... 23
2. Where there has been a substantial compliance with the law, the want of a rigid compliance with the mere letter of the Statute, requiring a bond to be taken, is not a fatal objection to the bond. *Central Bank vs. Kendrick. Dudley*..... 67
3. When a Statute prescribes the form and condition of the bond, and declares all bonds taken in any other form void; the bond prescribed should be strictly pursued. *Ibid.*
4. If a bond be joint and several, the party for whose benefit it was made, may sue either or both the obligors at his election. *Spratlin vs. Hudspeth. Dudley*..... 156
5. In an action on a bond to save harmless a security on another bond, it is sufficient that the record shows the security to have been damned, and the evidence upon which he becomes damned need not be produced. *Spratlin vs. Hudspeth. Dudley*..... 156
6. In an action upon a bond conditioned to pay a debt by instalments,

- or to pay rent, the simple production of the bond, on the part of the plaintiff, is sufficient to put the defendant upon the proof of the performance of the condition; and the same principle is applicable to a bond conditioned to deliver, on a certain day, a deed and muniments of title. *Stewart vs. Grimes et al. Dudley*..... 209
7. The bond given in pursuance of the Statute regulating attachments, must be such a bond as can be enforced by the Courts of this State; therefore, if the obligor reside in another State, the bond is bad, and the attachment will be dismissed. *Thompson vs. Arthur. Dudley*... 253
8. The giving of bond and security upon the carrying up cases to the Supreme Court, is optional, not compulsory. *Doe ex dem. Truluck et al. vs. Peeples et al. 1 Kelly*..... 8
9. It is essential to a recognizance for the appearance of the *conusor* to answer to charges against him, that it show the cause of taking it. *Nicholson vs. The State. 2 Kelly*... 365
10. A recognizance must stand or fall by itself, and if not good on its face, by failing to specify the offence for which the accused is arrested and bound to appear and answer, parol evidence is inadmissible to supply the defect. *Ibid*..... 366
11. Attachment bond containing the conditions prescribed by law, and the further condition that the plaintiff shall prosecute his suit, with effect, at the term to which it is returnable, is a valid bond. *Kahn vs. Herman. 3 Kelly*..... 271
12. For appearance to answer a criminal charge before the Superior Court, is a valid bond, though taken and tested by the Sheriff. *Park vs. The State. 4 Ga*..... 329
13. Before bail in a criminal cause can be made liable, the record must show that the principal was called, and did not appear. *Ibid*.
14. A bond executed by a debtor, arrested by *ex. sa.* to appear at Court, to take the benefit of the Honest Debtor's Act, for less than twice the amount of the creditor's debt, is valid and binding. *Colley vs. Morgan. 5 Ga*..... 178
15. A claim bond should be made payable to the Sheriff. *Anthony vs. Brooks. 5 Ga*..... 576
16. A bond may be delivered as an *escrow* by the sureties to the principal obligor. *Crawford, Gov. vs. Foster. 6 Ga*..... 202
17. In an action on a forthcoming bond, conditioned to deliver proper-

- ty to the Sheriff at the time and place of sale, *when required* by him : *Held*, that it was unnecessary to prove a *personal* demand—the advertisement being a sufficient notice to the party. *Thompson vs. Mapp.* 6 Ga..... 260
18. Where the attachment bond is made payable to the individual members of a firm, where the attachment is sued out against the firm, and it does not recite the obligees composing the firm, the bond and attachment are both void. *Birdsong et al. vs. McLaren.* 8 Ga..... 521
19. In order to sue out an attachment in behalf of a firm, one partner has the right to execute a bond in the name of the firm. *Wilson et al. vs. Smith & Co.* 8 Ga..... 551
20. It is no plea for a surety, that a bond was obtained by duress. *Spicer vs. The State.* 9 Ga..... 49
21. An instrument under the hand and seal of the party executing it, imports a consideration in law, and a demurrer to the admissibility of such an instrument in evidence, for *want of consideration*, will be overruled. *Rutherford vs. The Ex. Com. Bap. Conv. &c.* 9 Ga..... 54
22. When the names of the sureties to a bail bond are inserted in the obligatory part of the bond, but omitted in the condition: *Held*, that such omission did not alter the legal effect of the instrument. *Davidson et al. vs. Carter & Ritch.* 9 Ga..... 501
23. A bond by an administrator to convey real estate of his intestate, in contemplation of a sale under the Ordinary's order, is void, and is incapable of being enforced, either at Law or in Equity, as contrary to the policy of the Statute authorizing administrators to sell the real estate of their intestate. *Logan vs. Gigly.* 9 Ga..... 114
24. The plea of *total* failure of consideration to an action upon a contract under seal, on the ground of *fraud*, will be allowed in a Court of Law. *McKnight vs. Killett.* 9 Ga..... 532
25. There is no Statute in Georgia, authorizing an agent to execute a forthcoming bond for property levied on by attachment. *Gilmer vs. Allen.* 9 Ga..... 208
26. A defendant arrested under a *ca. sa.* from a Justices' Court, gave bond for his appearance at the Justices' Court from term to term, and not to depart thence, without leave of the Court, and was discharged by the Constable: *Held*, that the bond was a nullity, and that the Constable was liable to the plaintiff in *fi. fa.* upon a rule, for the amount of the execution. *Faircloth vs. Freeman.* 10 Ga..... 249

27. If A agrees to join B as his surety in an appeal bond, and executes and delivers the same as an *escrow*, on condition that C shall join in and execute the bond as co-surety, but C never unites in the bond, A is released from all liability thereon, at Law or in Equity. *Riley vs. Johnson*. 10 Ga..... 414
28. As between the obligee and obligor, the latter ought not to be permitted to allege that his deed was not delivered on the day it bears date, for the purpose of defeating a recovery. He should, in such case, be held concluded by his signature. *Ibid*.
29. An appeal bond signed by four sureties, who gave the Clerk to understand at the time of its execution, that a fifth, whose name was contained in the body of the instrument, was to sign also, may be considered as delivered absolutely, and not as an *escrow*. *Ibid*.

See *Appeals*, II. a; *Attachments*, II.

II. OFFICIAL BONDS.

1. Where a Statute prescribing the condition of a bond to be given by an officer, agent, trustee, or other person, enumerates particular duties, and also contains general words which include his whole duty, the obligor is not discharged from his general obligation by an omission of such particular enumeration. *Justices of the Inferior Court vs. Wynn. Dudley*..... 23
2. A bank was incorporated, with the power to appoint necessary officers, to take bonds from them, and make all necessary by-laws, rules, and regulations. By one of the by-laws of such corporation, it was provided, that it should be the duty of every other officer of the bank to perform such services as might be required of them, by the president and cashier. In an action against principal and sureties, on a bond given by a book-keeper of said bank, conditioned for the faithful performance of the duties of his office, and all other duties required of him in said bank, &c: *Held*, that the bond was taken in conformity to, and authorized by the charter. *Planter's Bank vs. Lampkin. R. M. Charl*..... 29
3. And where such book-keeper, whilst in the discharge of "other duties in said bank," fraudulently took large sums of money therefrom: *Held*, that the securities on his official bond were liable to the amount of their bond. *Ibid*.
4. The failure of obligee to notify to the securities of obligor, the delinquency of their principal, as soon as discovered, will not relieve them from their obligation. *Ibid*.

5. Where an action is brought on the official bond of a Sheriff, in the name of the Governor of Georgia, in being, who is individually designated, and such Governor dies pending the action, it is not necessary to amend the suit, by the substitution of the name of his successor. *Rabun, Governor, &c. vs. Toulser. R. M. Charl.*..... 60
6. Can such bond be put in suit, without the previous order of the Judge of the Superior Court? *Quere. Ibid.*
7. In a suit upon a guardian's or administrator's bond, the party is not entitled to the custody of the original, but to a certified copy only. *Bryant, Guardian, &c. Beall, Ex'r of Pye, vs. Owens et al.* 1 *Kelly*.... 368
8. A bond voluntarily tendered by a Sheriff in office, and accepted more than thirty days after his election, is bad as a statutory bond, but good at Common Law. *Stephens, et al. vs. Crawford, Gov. use, &c.* 1 *Kelly*..... 582
9. An official bond, required by Statute, but which is not in conformity with its provisions, is good, so far as it does conform, unless the Statute expressly provides that bonds not made in conformity therewith shall be void. *Ibid.*.....581—2
10. A bond made to the Governor for the time being, and his successors in office, is considered as made to the office, and passes to each incumbent by succession, without assignment. *Stephens et al. vs. Crawford, Gov. use, &c.* 1 *Kelly*..... 588
11. The liability of the securities of an administrator is an ultimate liability, not primary. *Cameron et al. vs. The Justices, &c.* 1 *Kelly*..... 37
12. The Act of the Legislature of 1841 repealed the charter of the Bank of Darien, and transferred its assets to the Central Bank. John R. Anderson, Esq. was appointed by the Central Bank an agent to collect these assets, and gave bond: *Held*, that this bond was correctly made payable to the Governor of the State of Georgia. *Anderson et al. vs. The State.* 2 *Kelly*..... 371
13. Where the old Sheriff fails to deliver to his successor an execution placed in his hands during his term of office, and receives money thereon fourteen days after the appointment and qualification of the new Sheriff, his securities are not liable in an action on the bond, to account to the defendant for said money, notwithstanding he has been compelled to pay it a second time to the plaintiff. *McDonald, Gov. &c. vs. Bradham.* 2 *Kelly*..... 248
14. Official bonds, when not conformable to the Statute which requires them, although they may be good at Common Law, can only be en-

- forced, according to the rules of the Common Law. *Stephens et. al. vs. Crawford, Gov.* 3 *Kelly*..... 512
15. A Constable's bond made with *one* security, instead of *two*, as required by the Statute, is a good voluntary bond. *Justices, &c. vs. Ennis.* 5 *Ga.*..... 569
Query! Whether good as a statutory bond. *Ibid.*
16. A Sheriff's bond, taken and approved by only *two* of the Justices of the Inferior Court, is not good and valid as a statutory bond. *Crawford, Gov. &c. vs. Meredith and another.* 6 *Ga.*..... 552
17. If two of the sureties of a Sheriff's bond, sign upon condition that the instrument is not to be considered as executed until the signatures of two others are obtained, and it is left, with the knowledge and by the consent of the Justices of the Inferior Court who were officiating in taking it, in the hands of the principal obligor for that purpose, it is no error to admit evidence of those facts, or to hold that the bond is void as to the defendants who subscribed it, provided the condition is not performed. *Crawford, Gov. vs. Foster.* 6 *Ga.*..... 202
18. An execution issued upon an order absolute against the Sheriff, is irregular and void; the proper remedy being an attachment. The sureties on his bond, however, are not discharged on that account; their liability being for the official default of their principal, which is established by the judgment on the rule. *Towns, Gov. &c. vs. Hicks et al.* 6 *Ga.*..... 235
19. A judgment against a Sheriff on a rule to pay over money, is no satisfaction, and no discharge of the sureties on his bond. *Ibid.*
20. A Sheriff's bond, taken and approved by only two of the Justices of the Inferior Court, is not good as a statutory bond. *Crawford, Gov. &c. vs. Meredith et al.* 6 *Ga.*..... 552
21. The sureties of a Sheriff, after recoveries have been had against them to the amount of their bond, may defend themselves at law, against all pending or future suits on that ground. *Bothnell et al. vs. Sheffield et al.* 8 *Ga.*..... 569
22. Where the Court of Ordinary have granted letters testamentary, of administration or guardianship, to a person entitled and capable of discharging the duties of the new trust, no new appointment can be made, unless the former is vacated by death, removal or some other way; and the new appointment being void, the bond also is void, given for the faithful performance of the trust delegated to the new appointee. *The Justices, &c. vs. Selman et al.* 6 *Ga.*..... 483

23. A Sheriff's bond, taken and approved by the Inferior Court, and averred to have been delivered to the Governor of the State, and signed and sealed, and attested by *two* of the Justices of the Inferior Court: *Held*, to be good as a voluntary, but bad, as a statutory bond, because not given within thirty days after the election of the Sheriff. *Crawford, Gov. &c. vs. Howard et al.* 9 Ga..... 314
24. The Sheriff and his sureties held liable on a voluntary bond, for the acts of his deputies, although it contains no stipulation to that effect: *Held*, that such a stipulation is not necessary to the validity of a Sheriff's bond, under our Satute. *Ibid.*
25. A bond being taken and approved by the Justices of the Inferior Court, to protect the people of the County from the official misconduct of the Sheriff elect, it is not competent for these same Justices to discharge this obligation by the substitution of another bond, some thirty days thereafter; especially, where one of the three Justices was a co-obligor in the first bond. *Towns, Gov. &c. vs. Stephens et al.* 9 Ga. 585

III. BOND FOR TITLES TO LAND.

1. In an action on a bond for titles, the measure of the damages is the value of the land at the time of the breach. *Newton vs. Harris. Dudley*..... 180
See also *Bryant vs. Hambrick.* 9 Ga..... 133
2. A bond for titles is good color of title against strangers, although the purchase money is not paid. *Fain vs. Garthright.* 5 Ga..... 6
3. A executed his bond to B, conditioned to make him a title to a tract of land therein described, whenever the litigation then pending respecting it, should terminate. B brought suit on the bond, alleging a forfeiture thereof, in which there was a verdict and judgment for the defendant, upon the "general issue:" *Held*, that the former recovery was no bar to another action, and that parol evidence was admissible to show that on the first trial, no other issue was submitted to the Jury, save only the fact as to the pendency of the litigation referred to in the bond, and that the testimony was restricted exclusively to that point. *Ezzell vs. Maltbie et al. Ex'rs.* 6 Ga..... 495
4. By making a proper case in Equity, a vendee, under a bond for titles, who has been evicted, may recover the value of the beneficial and permanent improvements put upon the premises. *Bryant vs. Hambrick.* 9 Ga..... 133
5. The registration of a bond for titles to land, not being authorized by law, does not entitle it to be read in evidence. *Aliter* of thirty years

old, with possession under it, or if produced on notice by the opposite party, he claiming an interest under it. *Beverly and another vs. Burke.* 9 Ga..... 440

6. A purchaser who is in possession under a bond for titles, cannot obtain relief against the payment of the purchase money, on the ground of a defect of title, unless the obligor is insolvent or without the jurisdiction of the Court. *McGehee et al. vs. Jones.* 10 Ga..... 127

IV. INJUNCTION BOND.

1. The "eventual condemnation money" secured by an injunction bond, is the amount ultimately fixed and settled by the judgment or decree of the Court. *Lockwood vs. Saffold.* 1 Kelly.....73-4

V. SUITS ON BONDS, PARTIES, &c.

1. Where a bond is made payable to A, as the executor of B, and A dies: *Held*, that the right to sue upon the bond, was in the representative of A, and not of B. *Horskins vs. Williamson.* T. U. P. Charl..... 145
2. Where a bond was conditioned to deliver up certain negroes, imported into this State, or else produce such proof as the Statute required, to show that they were legally imported: *Held*, that *scire facias* upon this bond, would lie in the County where it was given, and that it was not necessary to sue the obligee, in the County of his residence. *The State vs. Couper.* T. U. P. Charl..... 306
3. If a party under arrest be required to execute a bond, not according to law, duress may be pleaded, and the bond or recognizance be avoided. *The Governor vs. Williams et al.* Dudley..... 244
4. In an action of debt on a penal bond, conditioned for the payment of a lesser specified sum of money on a day certain, the sum mentioned in the condition, and all interest due thereon, may be recovered, without reference to, and though it exceed the penalty of the bond. *Moss vs. Wood.* R. M. Charl..... 42
5. Where a suit was instituted on a bond given for a certain sum of money, and conditioned for the performance of a duty, without any stipulation as to interest, and the Jury on an issue of fact submitted to them, found the bond declared on, to be the deed of defendant, and assessed nominal damages: *Held*, that interest could be awarded on such bond only in the shape of damages assessed by a Jury. *The Governor vs. Daniel.* R. M. Charl..... 449

6. *Held*, also, that the verdict rendered, only found the debt mentioned in the bond, and as that contained no stipulation for interest, the execution which had issued for principal, and interest from the date of the bond, was illegal. *Ibid.*
7. In a suit against a discharged security on a guardian's bond, the plaintiff must prove affirmatively, some default or act of malfeasance, on the part of the guardian, prior to the discharge of the security, which in law would constitute a breach of the bond. Evidence of the bare reception, by the guardian, of his ward's estate, and nothing more, is not sufficient to charge the security. *Bryant, Guardian, &c. and Beall, Ex'r of Pye. vs. Owens et al.* 1 *Kelly*..... 91
8. In a case where the decree against the guardian is silent as to the time when the devastavit by him took place, and when the security was discharged by the Court of Ordinary, before the commencement of the suit in Equity, in which the decree was rendered, the decree alone is not sufficient to charge the security in a suit against him on the guardian's bond. *Aliter*, when the security has not been discharged. *Ibid.*.....372-5
9. Upon a Common Law bond, there can be but one recovery, and a former recovery upon the same bond may be pleaded in bar of a subsequent suit. *Stephens et al. vs. Crawford, Gov.* 3 *Kelly*..... 512
10. *Sci. fa.* is the proper remedy on a bond for appearance in a criminal case given to the Sheriff. *Park vs. The State.* 4 *Ga.*..... 329
11. The record must show the forfeiture of the bond. *Ibid.*
12. In an action on a forthcoming bond, conditioned to deliver property to the Sheriff at the time and place of sale, when required by him: *Held*, that it was unnecessary to prove a personal demand, the advertisement being a sufficient notice to the party. *Thompson vs. Mapp.* 6 *Ga.*..... 260
3. In a suit on a bond, the plaintiff is not held to prove its execution, unless put in issue by plea of *non est factum*. *The Justices, &c. vs. Sloan.* 7 *Ga.*..... 31
4. The Justices of the Inferior Court are not the legal obligees of a bond payable to the Justices, &c. *sitting as a Court of Ordinary*, so as to authorize them to maintain suit on such bond. *The Justices, &c. vs. Wooten et. al.* 7 *Ga.*..... 465
15. A rule absolute against the Sheriff, ordering him to pay over money, is neither an extinguishment of his official security, nor a bar to a suit against his sureties. It is but one of the several remedies which the

injured party may use successively, until he obtains satisfaction. In a suit on his bond, it is conclusive against the principal, but presumptive evidence only against the sureties; and they will be allowed to prove everything *ab origine*, which would have protected the principal from liability. *Crawford, Gov. &c. vs. Word et al.* 7 Ga..... 78

16. The sureties of a Sheriff, after recoveries have been had against them to the amount of their bond, may defend themselves at law, against all pending or future suits on that ground. *Bothwell et al. vs. Sheffield et al.* 8 Ga..... 569

17. Where an administrator, upon the discharge of his first sureties, gave a new bond, and subsequently becomes insolvent: *Held*, that Equity will entertain jurisdiction of a bill against the administrator and both sets of sureties, praying a discovery of the amount of the devastavit, and the time when it occurred, in order to charge each set of sureties, according to their respective liabilities on their bonds. *Alexander, Adm'r, vs. Mercer et al.* 7 Ga..... 549

18. Sureties to executors', administrators' and guardians' bonds, are not liable to suit thereon at Law, under the Act of 13th December, 1820, until the plaintiff has first established his demand against their principal, in his representative character, by suit and judgment, or decree of a Court of competent jurisdiction. *The Justices, &c. vs. Sloan.* 7 Ga..... 31

19. In an action by the present guardian, against the administrator of the former guardian and his sureties on the bond, the plaintiff must show affirmatively, some act of waste or mal-administration by his predecessor during his life; and the bare reception of money for his wards, without farther proof of default, is not, *per se*, a breach of the bond. *Ray, Adm'r, et. al. vs. The Justices, &c. M. C.* 6 Ga..... 303

20. The Act of 1820, authorizing securities to be joined with the principal, in suits upon executors', administrators' and guardians' bonds, considered. *Ibid.*

21. In an action by the present guardian against the administrator of a deceased guardian and his sureties, upon their bond, in which the breach alleged is the receipt of three several sums of money by the former guardian, which he had appropriated to his own use, the measure of damages is the aggregate of principal and accruing interest. *Ibid.*

22. Where an action on a Sheriff's bond is brought for the purpose of recovering a sum of money found to be due to two jointly, on an order absolute against the Sheriff, it is no objection to the sufficiency of the breaches assigned, that the declaration does not state the amount

- of the interest of each in that sum. *Towns, Gov. vs. Hicks et al.*
 6 Ga..... 235
23. In an action on a forthcoming bond given by a claimant, a plea of tender of the property, after the day of sale, is bad. *Mapp vs. Thompson.* 9 Ga..... 42
24. Anything said or done by the plaintiff in *fi. fa.* which will amount to a waiver of the obligation to deliver the property at the time and place of sale, is a good defence to an action on the bond. *Ibid.*
25. To charge the obligors, it is necessary that they should be notified of the time and place of sale, and a legal advertisement is sufficient notice. *Ibid.*
- Books. See *Evidence*.

BRIDGES.

1. An Act of the Legislature incorporating the Irwinton Bridge Company, for the purpose of erecting a bridge across the Chattahoochee river, which authorized the company to take the private property of the citizen, for the purpose of erecting the eastern abutment of this bridge, providing just compensation to be made therefor, is not a violation of the 10th section of the first article of the Constitution of the United States, which prohibits the States from passing any law impairing the obligation of contracts. *Young, Plff in Error, vs. McKenzie, Def't, et al.* 3 Kelly..... 31
2. The Act of 1828, which provided that wagons and carriages, loaded with corn and cotton, should pass the Ocmulgee bridge, free of toll, is repealed, *pro tanto*, by the Act of 1847, which vested in the corporate authorities of the City of Macon, the right to regulate the tolls of said bridge; the latter Act repealing all laws and parts of laws militating against its provisions. *The Mayor, &c. vs. The Macon and Western R. R. Co.* 7 Ga..... 221
3. The State has a right to erect bridges whenever and wherever the Legislature may deem them necessary for the convenience of the public. *Young vs. Harrison.* 6 Ga..... 130
4. The right of *eminent domain*, by which the State may take private property for public purposes, when the necessities of the country re-

quire it, is an inherent right of this, as of every other Government
Ibid.

5. The State may construct public works, such as roads and bridges, by taxation, or the personal labor of its citizens, or through the instrumentality of individuals or corporations. *Ibid.*
6. A bridge may be established, and a keeper appointed, without any regard to the ownership of the soil, should the Legislature so direct. *Ibid.*
7. The franchise or right to keep ferries and bridges, should, if practicable and consistent with the public welfare, be conferred on the owners of the soil, rather than on strangers. *Ibid.*

See *Ferries*.

BURDEN OF PROOF. See *Evidence*, VI.

BY-LAWS.

1. A by-law which asserts a lien on the stock of members of a corporation for debts due the company, is, as between the corporators themselves, valid and binding. *Tuttle vs. Walton*. 1 *Kelly*..... 48
2. So held by all the Judges. See their opinions, from page 47 to 68. 1 *Kelly*.
3. Such a by-law is not repugnant to the charter, nor the laws of the land, nor against public policy, nor in restraint of trade. Per WARNER, Judge. 1 *Kelly*..... 48
NISBET, Judge, contra, as per dissenting opinion. 1 *Kelly*..... 56-68
4. The plaintiff having purchased the stock, with notice of the lien of the corporation under the by-law, took it subject to that lien. LUMPKIN, Judge, (his opinion.) 1 *Kelly*..... 54
5. The by-law relied on, is invalid at Common Law, as against creditors. NISBET, Judge, dissenting opinion. *Tuttle vs. Watson*. 1 *Kelly*..... 62
6. It is repugnant to the whole drift and policy of Georgia legislation. NISBET, Judge. *Ibid.*..... 66

CANCELLATION OF DEEDS. See *Equity*, I. e.

CARRIER. See *Act of God*; *Bailment*.

CA. SA. See *Execution*.

CASHIER. See *Banks and Banking*, 48; *Evidence*.

CERTIFICATE OF DEPOSIT. See *Lien*.

CERTIORARI.

1. The Superior Courts in Georgia have the right by *certiorari* to review the decisions of any Inferior Court, including Corporation Courts. *Roe vs. The Mayor, &c. of Savannah. T. U. P. Charl.*..... 36
2. A *certiorari* will lie to any judgment of the Court of Ordinary, notwithstanding a remedy by appeal is given by the Statute. *McAskill vs. McAskill. T. U. P. Charl.*..... 151
3. Generally, the application for a *certiorari* must be supported by affidavit. *Rehr vs. Gantier. T. U. P. Charl.*..... 279
4. But where the error is apparent upon the record of the proceedings of the Court below, the affidavit is unnecessary. *Hunter & Minis vs. Hunter. T. U. P. Charl.*..... 303
5. Bond is only necessary where danger would probably result from insolvency or departure beyond the jurisdiction of the Court. *Ibid.*
6. The constitutional writ of *certiorari* is applicable to the errors of inferior jurisdiction, contra-distinguished from the "Inferior Court." The judicial writ of *certiorari* is alone applicable to the "Inferior Court," as before distinguished. *Ex parte Simpson. R. M. Charl.*..... 111
7. The necessity of exceptions and 20 days notice, applies only to the judicial writ. *Ibid.*
8. It seems, that if a party seek to avail himself of an error of the Court, so as to carry up his case by *certiorari*, he must reduce his exceptions to writing at the time, and tender them during the trial. *Low, Taylor & Co. vs. Goldsmith. R. M. Charl.*..... 288

9. And where no exceptions had been tendered during the term, but were presented to the individuals composing the Court separately, and on a succeeding day, and were thus signed by them, and such exceptions were contradicted by a statement, signed by the same Judges, the rule was refused, upon the great irregularity of the proceedings. *Ibid.*
10. Where a new jurisdiction is created by Statute, proceeding according to the course of the Common Law, the Superior Court can cause its proceedings to be brought up and correct its errors. But where such newly created jurisdiction is summary, and does not proceed according to the Common Law, the Superior Court will, on *certiorari*, confirm or quash its proceedings. *Commissioners of Pilotage vs. Low et al. R. M. Charl.*..... 298
11. A *certiorari* may issue to bring up a decision of the Court of Ordinary, notwithstanding that by the law of Georgia, an appeal is given from the same tribunal to the Superior Court. *Roser vs. Marlow et al. R. M. Charl.*..... 542
12. The petitioner for *certiorari* must either be a party to the record, or one who has a direct and immediate interest in it, or is privy thereto. *Ibid.*
13. The writ of *certiorari* issues as well at Common Law, as by Statute. It is a constitutional writ. The Judiciary Act of 1799, so far as it relates to *certiorari*, is an affirmative Statute, without a negative, express or implied. The mode prescribed by it is accumulative; at all events, so far as relates to the proceedings of other Courts than the "Inferior Court." *Ibid.*
14. It is not necessary that exceptions should be taken in the Court below, in order to bring up a decision of a Court of Ordinary. *Ibid.*
15. A *certiorari* was granted and sustained upon the ground that the Justice's Court had misinterpreted the legal effect of certain articles of agreement introduced in evidence before it. *Barnett vs. Justices, and Totley &c. Dudley.*..... 175
16. No matter can be assigned as a ground of error in the proceedings before a Justice's Court, that was not urged in that Court. *Dodson vs. Conally et al. Ga. Decisions, part I.* 132. *Chambers vs. Dickson. Ga. Decisions, part I.*..... 164
17. The Inferior Court may review and annul an order absolute against the Sheriff, at a subsequent term, upon motion, when it is made to appear that he was not in contempt, and its action is subject to revision by the Superior Court, by writ of *certiorari*. *Chipman vs. Barron.* 2 *Kelly.*..... 225

18. It is the duty of the Judges of the Superior Courts, to grant a *certiorari*, to all cases in a Justices' Court, upon a proper case made before him. Per LUMPKIN J. in *Dickinson vs. McCamey*. 5 Ga..... 486

CHALLENGE. See *Jury*.

CHANCERY. See *Equity*.

CHARGE OF THE COURT.

1. The Court has a right to charge the Jury on all questions of law raised by counsel, or to instruct them as to what he may believe to be perversions by one counsel of the legal positions assumed by opposite counsel *Matthews vs. Poythress*. 4 Ga..... 287
2. It is the right of the Judge to express his opinion on the facts, to the Jury, but not to direct their finding. *Holder vs. The State*. 5 Ga..... 441
3. In criminal cases, it is the right and duty of the Judge, to instruct and officially direct the Jury, as to the law of the case, whilst they have also the right to judge of the law, as well as of the facts. *Ibid*.
4. In an indictment for murder, the Court instructed the Jury, that "they must find the defendant guilty of murder, of voluntary manslaughter, or not guilty." *Held*, that the charge was an improper interference with the rights of the Jury to find on the facts, because it precluded them from all inquiry, as to any other grade of offence, than those specified. *Ibid*.
5. For the Court to announce, at the close of the testimony, that its mind was fixed and unalterably made up, upon the merits of the case, and then to arrest the argument before its conclusion, is an unwarrantable interference with both the rights and privileges of both counsel and Jury. *Beall vs. Mann*. 5 Ga..... 456
6. The Court has the power to express to the Jury, its opinion upon the facts, but to its exercise there are assignable limits, and, in a doubtful case, this infringement upon the peculiar province of the Jury, would constitute sufficient ground for a new trial. *Ibid*.
7. It is error in the Court to intimate doubts in its charge, as to the competency of evidence admitted before the Jury. *Monroe vs. The State*. 5 Ga..... 85

8. Also, to remind the Jury, that the defendant has a chance to carry his case up to the Supreme Court. *Ibid.*
9. The Court, in its charge to the Jury, should never assume that certain facts are or are not proven; and should the Court feel it to be its duty to intimate its opinion that there is, or is not sufficient evidence to establish a certain matter, it should, at the same time, instruct the Jury to consider the evidence, and to decide as they shall find the truth to be. *Potts vs. House, Ex'rs.* 6 Ga..... 324
10. It is error in the Court to discredit the testimony of *relatives* as such—relationship being a circumstance only from which the Jury may infer a bias. *Ibid.* 6 Ga..... 324
11. It is error in the Court, in its charge to the Jury, to intimate doubts as to the competency of legal evidence which has been submitted to them on the trial—it being calculated to weaken its force in their estimation. *Ibid.*
12. Instructions of the Court, which assume or presuppose a fact proper for the decision of a Jury, should not be given where there is conflicting testimony. *Robinson vs. Schly and Cooper.* 6 Ga..... 515
13. When the Court charges the law correctly, although prefaced by preliminary remarks, not affecting the merits of the controversy between the parties, a new trial will not be granted. *The Mayor, &c. vs. Goetchius.* 7 Ga..... 139
14. Where the Court charges the Jury that it is “*not a little surprised that there should be an attempt made to acquit the defendant,*” who was indicted for an assault and battery; but at the same time instructed them that it was their duty to acquit or convict, according to the evidence, under the definition of the offence: *Held,* that although the first part of the charge was clearly objectionable, yet, taking the whole together, there was not such error in law, as would authorize a reversal of the judgment, and the granting of a new trial. *Keaton vs. The State.* 7 Ga..... 139
15. It is the duty of the Court to apply the law to the facts of the case, as ascertained by the evidence. And it is error in the Court to submit the whole case to the Jury, with direction to find as they shall think right and proper between the parties, regardless alike of the law and the facts. *The Ruckersville Bank et al. vs. Hemphill et al.* 7 Ga.. 396
16. It is error in the Court, in summing up to the Jury, to select one piece of evidence, and express a strong and decided opinion respecting it. Either the whole testimony should be presented, or else the duty had better be altogether omitted. *Johnson vs. Kinsey.* 7 Ga..... 428

17. Where the issue before the Jury is, whether a party has waived a lien given him by contract, or by operation of law, it is error in the Court to charge that the testimony should be *clear and explicit*. It is sufficient that the Jury be satisfied of the fact. *Williams et al. vs. Chapman.* 7 Ga..... 467
18. It is error in the Court, although he may charge the law correctly, to instruct the Jury as to a state of facts not proven. *Butt, Trustee, vs. Maddox.* 7 Ga..... 495
19. Where the Court charges the Jury correctly on a point of law, it is no error that the Judge did not specify more minutely the shades of difference in the law, where no request is made by counsel for this purpose. *Studstill vs. The State.* 7 Ga..... 2
20. The presiding Judge has the right, in a criminal case, and it is his duty to declare, what the law is upon a given state of facts. *Ibid.*
21. It is error to instruct the Jury as to the law arising from facts which are not proven, and about which there is no evidence. *Bethune vs. McCrary.* 8 Ga..... 114
See also, *Montgomery, Adm'r, &c. vs. Evans.* 8 Ga..... 178
22. The Circuit Judge, in opening his charge to the Jury, said, "He wished counsel to take notice of his charge, for he supposed the case would be taken up, and if he erred, he could be corrected, and if the Jury found contrary to evidence, they could be corrected:" *Held*, that the remark relative to the Jury was improper, as tending to relieve them from the exclusive responsibility of trying the facts of the cause. *Colquitt vs. Thomas et al.* 8 Ga..... 258
23. The presiding Judge is requested by counsel, in the hearing of the Jury, to give in charge a legal proposition, to which request he replies, "Well, I charge it," without any thing more: *Held*, to be error. *Ibid.*
24. Where the Court is requested by counsel to charge on points of law, which bear upon the case, it is the duty of the Court to charge on the points. *Galt vs. Jackson.* 9 Ga..... 151
25. A charge upon an assumed state of facts, not proved before the Jury, is erroneous. *Harrison vs. Thompson.* 9 Ga..... 310
26. The question of adverse possession is for the decision of the Jury, and not the Court. *Beverly and another vs. Burke.* 9 Ga..... 440
27. For the presiding Judge to charge the Jury, that the plaintiff's possession is "*uninterrupted, continuous, notorious, sufficient and adverse,*"

is error, and for which, under the Act of 1849-'50, a new trial *must* be granted. *Ibid.*

28. The Court, in charging the Jury, does not violate the Act of 1850, in explaining to them the nature and effect of direct or circumstantial evidence. *Bullock vs. The State.* 10 Ga..... 46
29. It is no error in the Court to refuse to charge as asked, provided the instructions called for are not authorized by the evidence exhibited on the trial, and are applicable to a different state of facts. *Lessee of Pendergrast vs. Prather and another.* 10 Ga..... 218
30. A judgment will not be reversed merely because a charge, legal in itself, may not be sufficiently full, or is calculated to mislead the Jury. In each case it is proper to ask an explanatory or additional charge. *Ellis vs. The Lessee of Smith.* 10 Ga..... 253
31. Where a legal and proper request is made on the Court to charge the Jury, the party making such request is entitled to have the instructions prayed for, given to the Jury as requested; and it is error in the Court to say to the Jury, "such is the law," in responding to such request. *Davis vs. The State.* 10 Ga..... 100
32. It is not error in the Court to refuse to give in charge to the Jury, a principle of law which grows solely out of evidence which the Court has withdrawn from the Jury, because illegally admitted. *Salter vs. The Lessee of Williams.* 10 Ga..... 186
33. Where plaintiff in ejectment has shown a good title in himself, and the defendant relies upon a paramount outstanding title, it is not error in the Court to instruct the Jury, that he must show a clear and indisputable title in some one else. *Ibid.*
34. When requested to do so, it is not only the province, but the duty, of the Court, on the trial of Equity causes, to instruct the Jury what portions of the defendant's answer are *responsive* to the complainant's bill, so that the Jury may understand from the proper source, what is legal evidence for their consideration. *Beall, Adm'r, vs. Beall and Beall.* 10 Ga..... 342
35. It is error in the Court to charge the Jury, on an assumed state of facts, which had not been proved. *Perry, for the use, &c. vs. Hudson.* 10 Ga..... 362
36. It is error for the Judge to express an opinion to the Jury on the facts proven. *Ratteree vs. Nelson.* 10 Ga..... 439
37. It is not the province of the Court to express an opinion as to the

sufficiency of the evidence in a criminal case. The Jury alone have the right to determine upon the force and effect of the facts and circumstances proved, and whether or not they are satisfactory in warranting them in finding the defendant guilty. *Berry vs. The State.* 10 Ga..... 511

See *Criminal Law*, V.

CHARITIES AND CHARITABLE USES.

1. The Act of 9 Geo. II. ch. 36, in reference to bequests to charitable uses, is not of force in Georgia. *Beall et al. vs. Ex'rs of Fox.* 4 Ga. 404
2. The principles of the Statute of 43 Elizabeth, ch. 4, relative to charitable uses, have been adopted in Georgia. *Ibid.*
3. The Superior Courts in this State are empowered to exercise general Equity jurisdiction, in all cases where a Common Law remedy is not adequate, and have an inherent jurisdiction over bequests and devises to all charitable uses and trusts, where the same are definite and specific in their objects, and capable of being executed. *Ibid.*
4. A Court of Equity in Georgia has inherent jurisdiction to carry into effect the charitable bequests of a testator, according to his intentions, independent of the Statute of 43 Elizabeth. *Ibid.*

CHARTERS. See *Corporations*.

CIRCULAR. See *Evidence*, II.

CITIZENS.

1. Free persons of color are not citizens. *Cooper and another vs. Mayor, &c. Savannah.* 4 Ga..... 68

CLAIMS AND CLAIM CASES.

1. A claimant in a claim case, is confined to his own right, and cannot set up an outstanding title in a third person to defeat the levy of the plaintiff. *Forsyth vs. Marbury. R. M. Charl.*..... 324

2. Though it is for the benefit of society that claims to property levied on, should be interposed, and settled before the same is subjected to sale by the Sheriff, yet the law regulating claims is merely permissive—not mandatory. *Harrison vs. The Lessee of Neal. Dudley*..... 168
 See also, *Donaldson vs. Kendall, Ga. Decisions, part II.*..... 227

3. In cases of claim to land, the Courts have always required proof of the possession of the defendant in *fi. fa.* at the date of the judgment, or subsequent to it; and though possession is the weakest evidence of title, it is held sufficient to put the claimant to the production of his title. *Ibid.*

4. Where a person, knowing that he has title to property, stands by and suffers another to mortgage or sell it, without asserting his title, or making it known to the mortgagee or purchaser, he cannot afterwards set up his claim. And in such case, even infancy will be no protection, provided the minor had arrived at those years of discretion when a fraudulent intent could be reasonably ascribed to him. *Irwin vs. Morell. Dudley*..... 74
 See also, *Whittington vs. The Lessee of Wright. 9 Ga.*..... 23

5. If, on the trial of a claim, the Jury be satisfied that the claimant purchased the property with the money of the defendant in *fi. fa.* they ought to declare the sale void against creditors, even though it should have been made by a Sheriff, *in market overt.* *Cumming vs. Fryer. Dudley*..... 183

6. If A is present when an execution is levied on his property and does not object or interpose a claim, but on the day of sale publicly forbids the sale, and asserts his title in the hearing of the by-standers, he may afterwards institute an action against the purchaser and recover the property. *Irwin vs. Morell. Dudley*..... 74

7. Can a claimant, after issue joined and a trial on the merits, except to the regularity of the previous proceedings in the case? Query. *Davis vs. Barker. 1 Kelly*..... 559

8. A claim bond should be made payable to the Sheriff. *Anthony vs. Brooks. 4 Ga.*..... 576

9. In the trial of a claim, it is not necessary for the plaintiff in *fi. fa.* to produce the judgment upon which his execution is founded. The execution may be read in evidence without the judgment. *Deloach and Wilcoxson vs. Myrick.* 6 Ga..... 410
10. Proof of the possession by defendant in *fi. fa.* at the time or subsequent to the date of the judgment, of a slave of the same name, sex and age with the slave levied on: *Held*, sufficient to cast the *onus* on the claimant. *Ibid.*
11. The defendant in *fi. fa.* cannot be a witness for the claimant, nor can his declarations be given in evidence on his behalf. *Williams vs. Kelsey and Halsted.* 6 Ga..... 365
12. Where property is levied on and claimed under a sale under foreclosure of a mortgage: *Held*, that the judgment of foreclosure is *prima facie* evidence of indebtedness, and casts the burden on the plaintiff in *fi. fa.* of showing a want of consideration in the mortgage. *Ibid.*
13. Whether the consideration of the mortgage is *bona fide* or merely colorable to defraud creditors, or so inadequate as to constitute a badge of fraud, is a question of fact which should be left to the Jury, upon the whole evidence in the case, without any restriction on the part of the Court. *Ibid.*
14. The claimant is entitled in all cases, whether he holds under the defendant in *fi. fa.* or not, to show that the *fi. fa.* levied is inoperative, either by payment or otherwise. *Robinson vs. Schly & Cooper.* 6 Ga. 515
15. The claimant cannot, for the purpose of protecting himself, show paramount title in a third person. *Ibid.*
16. While the claimant may show the judgment satisfied, he must prove that the payment was made to the plaintiff or the person holding legal control under him. *Ibid.*
17. Where a plaintiff in *fi. fa.* founded on a judgment *quando*, levies on a negro claimed by a third person, proof that the negro belonged to the intestate at his death, and has never been in the possession of the administrator, nor controlled by him since his appointment, is sufficient to remove the *onus*. *Allen vs. Matthews.* 7 Ga..... 149
18. Upon the trial of a claim case, where the claimant claims through a judgment of foreclosure, on a mortgage made by the defendant in *fi. fa.* to his vendor, the plaintiff in *fi. fa.* may impeach the judgment and mortgage, and prove it fraudulent on the trial. *Williams, Adm'r, vs. Martin.* 7 Ga..... 377
19. When mortgaged property is levied on under a judgment of fore-

- closure, and a claim interposed, the plaintiff in execution must prove title to the property in the defendant, at the date of the mortgage, or make out a *prima facie* case, by proof of possession in the mortgagor, at that time, before the claimant is put upon an exhibition of his title. *Butt, Trustee, vs. Maddox.* 7 Ga..... 495
20. Where the property is claimed by a trustee: *Held*, that the mortgage deed and judgment of foreclosure, (although the mortgage recites that the property is and has been, for some time, in the possession of the claimant in his natural character, and although the mortgage deed is attested by the claimant as a Magistrate,) do not raise a *prima facie* presumption of right and title in the mortgagor to the property. *Ibid.*
21. An order of the Court of Ordinary, directing the sale of lands belonging to an estate, is a judgment of a Court of competent jurisdiction, and cannot be attacked and impeached collaterally, by an heir claiming such lands. Hence, when land is claimed at administrator's sale, advertised and offered under such order, it is not competent for the claimant to prove that the estate was settled, and the land divided without an administration, and that there were no debts to be paid. *McDade, Adm'r, vs. Burch, Adm'r.* 7 Ga..... 559
22. On the trial of the right of property under our claim laws, the possession of the defendant in *fi. fa.* after an absolute sale of the property, is *prima facie* evidence of fraud. *Carter vs. Stansfield.* 8 Ga..... 49
23. Where, on the trial of the right of property in a Justice's Court, the same oath was administered to the Jury as that of Special Jurors in the Superior Court: *Held*, not to be error—the oaths being substantially the same. *Ibid.*
24. The privilege allowed to claimants, by the Act of 1821, of *capriciously* withdrawing claims *once*, must be exercised before a verdict has been rendered for damages in favor of plaintiffs in execution. It cannot be done afterwards, so as to take the case out of Court, notwithstanding an appeal has been entered. *Attaway, Guardian, vs. Dyer et al.* 8 Ga..... 184
25. A sells land to B, and gets judgment on the notes given for the purchase money, and levies on the land in the possession of C, who interposes a claim: *Held*, that upon the trial of this claim, it is not competent for A to set up his lien as vendor, but that he is forced to go into Equity to assert it. *Colquitt vs. Thomas et al.* 8 Ga..... 258
26. Upon the trial of a claim, it is not competent for the claimant to prove the *bona fides* of his purchase by conversations between himself and his vendor, at a time subsequent to the purchase. *Ibid.*

27. The claimant, under our laws, being entitled to the custody of the property in dispute, may contract with third persons as to the possession thereof, and such third persons will be answerable only to the claimant. But if the claimant be a *feme covert*, and incapable from such disability of interposing a claim, coming wrongfully by the possession herself, she can confer no rights on others. *Hardwick vs. Hook, Receiver.* 8 Ga..... 354
28. A claimant cannot set up an outstanding title in a third person, to protect himself and defeat the plaintiff in *fi. fa.* *Beers et. al. vs. Dawson, Ex'r.* 8 Ga..... 556
29. The Claim Laws are *cumulative, permissive, not mandatory.* *Whittington vs. Doe ex dem. Wright.* 9 Ga..... 23
30. A surety on a claim bond, against whom judgment for damages and costs has been given, together with the claimant, and who has paid off the *fi. fa.* is entitled, under our Statute, to control the same, for the purpose of reimbursing himself out of his principal. *Keith vs. Wheelchel.* 9 Ga..... 179
31. When the Petit Jury in a claim case have returned a verdict giving damages against the claimant, and the verdict is appealed from, and pending the appeal the claim is withdrawn: *Held,* that the case goes on as to the question of damages, and stands for trial as before, and no execution can issue for the damages until the appeal is disposed of. *Strickland vs. Maddox et al.* 9 Ga..... 196
32. Upon the trial of a claim, upon an issue between the claimant and the plaintiff in execution, upon the question of fraud in procuring a discharge in the Bankrupt Court by the defendant in *fi. fa.* the mercantile books of a firm of which the defendant in *fi. fa.* was a member before his application, are admissible to show that he was the owner of an interest in that firm not returned in his schedule. *Bond vs. Baldwin.* 9 Ga..... 9
33. Where a verdict was rendered in a claim case, in which the plaintiff had been dead four years, and whose estate was unrepresented before the Court: *Held,* that the verdict ought to have been set aside on motion. *Ellis vs. Francis.* 9 Ga..... 325
34. The plaintiff in *fi. fa.* may dismiss his levy on the appeal, notwithstanding he has confessed judgment against himself on the first trial. *Favor vs. Stokes.* 10 Ga..... 370

CLERKS.

1. A clerk elected and commissioned under the Constitution, during good behavior, does not lose his office, nor is his commission vacated by the Act of 16th Dec. 1808, changing the tenure of office to two years. *Ex parte Clerk of Camden Co. T. U. P. Charl.*..... 191
2. According to the provisions of the Act of 1819, the Justices of the Inferior Court in this State continue in office for four years, and until their successors are elected and qualified: *Held*, that an election of Clerk of the Court of Ordinary, on the 2d Monday in January, 1849, by the old Justices, between the election and *qualification* of their successors, was a good and valid election. *Bonner vs. The State ex. rel. Pitts.* 7 Ga..... 478
3. Where two individuals claim the right to the office of Clerk of the Court of Ordinary, and one of them obtains a commission from the Governor, it is competent for the Judiciary to go behind the commission and inquire into the validity of the election, and decide the rights of the contesting parties. *The State ex. rel. Lowe vs. Towns, Gov.* 8 Ga. 360
4. The issuing of the commission is merely a ministerial act required by law, and not a duty enjoined by the Constitution, and it is therefore only *prima facie* evidence of title to the office, and not *conclusive*. *Ibid.*

See *Contempt*, 8.

COLLATERAL SECURITIES.

1. A, indorsee of a negotiable note given by B, placed the same in the hands of an attorney for collection; B, as collateral security for the payment of said note, placed in the hands of A's attorney, a larger amount of notes and other evidences of debt against third persons, taking a receipt therefor, in which the attorney stipulates, as soon as he collected sufficient to pay B's note, to deliver the same to B, and pay him any balance there might be remaining: *Held*, that the evidences of debt were not taken in satisfaction of B's note, and that such receipt did not amount to an agreement not to sue B until the securities mentioned therein could be collected. *Pennington vs. Watson et al. Dudley.*..... 98

2. A note transferred before due and without notice, as collateral security for an existing debt, is not liable in the hands of the transferee to any of the equities between the maker and payee. *Gibson et al. vs Connor. 3 Kelly*..... 48
3. Collateral securities in the hands of a creditor are not the subject of garnishment at the instance of other creditors. *Hall vs. Page. 4 Ga.* 428
4. Taking collateral security does not release a judgment. *Chambers vs. McDowell. 4 Ga.*..... 185
5. Where a creditor receives a deed to a tract of land, as collateral security for the payment of a note which is to be given at a future time, and the creditor dies before the note is given, and the consideration of the deed thus entirely fails, it would be fraudulent in the administrator of the creditor to retain the deed, and Equity will order the instrument to be delivered up to be cancelled. *Hollingshead, Adm'r, vs. McKenzie. 8 Ga.*..... 457
6. The general rule is, that where a party receives a note as collateral security, without any special agreement, he must use ordinary care and diligence in collecting it, and if any loss should accrue to the other party, by reason of the want of such care and diligence, the law will compel him to make good the loss, but if there is any special agreement between the parties, then they will be bound by such special agreement and not by the general rule. *Lee vs. Baldwin. 10 Ga.*..... 209

COLOR OF TITLE. See *Limitation of Actions*.

COMMISSION. See *Clerks*, 1 to 4.

COMMISSIONS. See *Administrators, Executors*. VII.

COMMON CARRIERS. See *Bailment*.

COMPOUNDING OF FELONY. See *Felony*.

CONSTABLE.

1. It is the duty of a Constable, before levying upon negroes or real estate, to enter upon the execution "*no personal property to be found*," and such entry is not traversable. *Daniel vs. The Justices, &c. Dudley.* 3
2. A Constable's bond, made with *one* surety, instead of *two*, as required by the Statute, is a good voluntary bond. *Justices, &c. vs. Ennis. 5 Ga.* 569
3. *Query.* Whether good as a statutory bond? *Ibid.*

4. Where a Justice's Court execution is lost, and its contents proven, and also a levy on land by the Constable, and a return of the same to the Sheriff, the Court will presume that there was also on it the entry of "no personal property to be found." *Lessee of Vaughan vs. Biggers.* 6 Ga..... 188

5. The general rule is, that where an officer is required to do an act, the omission to do which, would be a culpable neglect of duty on his part, it ought to be intended that he has duly performed it, unless the contrary is made to appear. *Ibid.*

6. The rule as to the admission of secondary evidence is this: where there is no ground for presuming that better secondary evidence exists, any proof is received, which is admissible by the other rules of law, unless the objecting party can show that better evidence was previously known to the other party, and might have been produced. *Ibid.*

7. A deed to land sold by the Sheriff, under a Justice's Court *fi. fa.* will be admitted in evidence, upon proof of the loss of the *fi. fa.* the levy and sale, and proof by presumption, the entry of "*nulla bona*" by the Constable was upon it. This case distinguished from *Hopkins & Burch*, 3 *Kelly*, 222. *Ibid.*

8. Where a Constable who did not write a good hand, requested a Justice of the Peace, *in his presence*, to make a return of "no property" on two *fi. fas.* he knowing the return to be true, of his own personal knowledge: *Held*, that the return was to be considered as the act of the Constable himself, and valid in law. *Ellis vs. Francis.* 9 Ga.... 325

9. It is the duty of the Constable to make an entry of service on a warrant or summons, in writing, and to sign such return. *Fitzgerald vs. Adams and another.* 9 Ga..... 491

10. A defendant, arrested under a *ca. sa.* from a Justice's Court, gave bond for his appearance at the Justice's Court, from term to term, and not to depart thence, without leave of the Court, and was discharged by the Constable: *Held*, that the bond was a nullity, and that the Constable was liable to the plaintiff in *fi. fa.* upon a rule for the amount of the execution. *Faircloth vs. Freeman.* 10 Ga..... 249

CONSTITUTIONAL LAW.

- I. GENERAL PRINCIPLES.
- II. LAWS IMPAIRING THE OBLIGATION OF CONTRACTS.
- III. *EX POST FACTO* AND RETROSPECTIVE LAWS.
- IV. LAWS TAKING PRIVATE PROPERTY FOR PUBLIC USES.
- V. LAWS AFFECTING TRIAL BY JURY.
- VI. LAWS CONTAINING MATTER DIFFERING FROM THE TITLES.
- VII. LAWS IMPOSING TAXES.

I. GENERAL PRINCIPLES.

1. The term *civil* cases, in the 1st section of the 3d article of the Constitution of Georgia, includes Equity causes. *Grimball vs. Ross. T. U. P. Charl.*..... 182
2. The Act of 1829, extending the laws of Georgia over the Cherokee country, and giving to the Superior Court jurisdiction over certain offences when committed therein, is neither unconstitutional nor inconsistent with the rights of the Cherokee Indians. *Tassels Case. Dudley.* 229
3. A bank bill issued by an institution taking its franchises from State authority, for the mere legal conveniences of a corporate body, is not a *bill of credit*, within the inhibition of the Constitution of the United States. *State vs. Calvin et al. R. M. Charl.*..... 151
4. The States retain the power to legislate upon the subject of Pilotage, within their own territories, and over their own citizens, unless such legislation interferes with, or is contrary to an Act of Congress, passed in pursuance of the Constitution. *Low, vs. The Commissioners, &c. R. M. Charl.*..... 302
5. *It seems* that the constitutionality of a legislative Act cannot be decided, on application for a *certiorari*, or other summary way. *Ibid.*
6. The negligence of a pilot, which authorizes his suspension, is not a *crime*, or *criminal proceeding*, within the meaning of the Constitution of the United States, or the amendments thereto. *Ibid.*
7. Neither is the proceeding against him, under the Statutes of Georgia, a "suit at Common Law," within the meaning of the 7th Art. of the Amendments to the Constitution of the United States. *Ibid.*
8. If there is a *doubt* as to the constitutionality of a law, the law ought to be sustained. *Ibid.*

9. Inspection laws may be constitutionally applied, not only to the produce of the country to be exported, but to imports brought in for the purposes of sale, within the State. *Green vs. The Mayor, &c. R. M. Charl.*..... 368
10. And therefore, an Ordinance of the City of Savannah, made under the authority of an Act of the Legislature of Georgia, inflicting a penalty on any person who should sell domestic liquors within the limits of the City, without having them gauged and inspected by the City Inspector, to whom a small compensation was to be paid by the vendor: *Held*, to be an inspection law and constitutional both as to the thing to be done, and the compensation to be made, and that its penalties might be properly enforced against the importer of the liquors in the original casks, who had sold the same, without having them gauged. *Ibid.*
11. The term "State," when used in the Constitution of the United States, is confined to a member of the American Confederacy. *Seton vs. Hanham. R. M. Charl.*..... 374
12. So much of the Act of Congress of 27th March, 1804, as extends the provisions of the Act of 1790 (regulating the mode of proving in one State the judicial proceedings, &c. in another State,) to the Territories of the United States, so as to prescribe the mode of proof, or the effect to be given to a judgment of a Court of a Territory in the Courts of a State, is unconstitutional. *Ibid.*
13. The States possess the right of legislating on the subject. *Ibid.*
14. The 18th section of the Judiciary Act of 1799, in reference to the mode of foreclosing mortgages, is constitutional. *Guerard & Polhill vs. Polhill. R. M. Charl.*..... 237
15. A fugitive from justice from another State, arrested here on probable evidence of guilt, may be confined for a reasonable time, to give an opportunity for the foreign Executive to demand him. *The State vs. John Loper. Ga. Decisions, part II.*..... 33
16. The second amendment of the Constitution of the U.S. which provides that a "well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed," embraces both the Federal and State Governments, and is applicable to laws passed by the Legislature of either. And so much of the Act of 1837, "to guard and protect the citizens of Georgia against the unwarrantable and too prevalent use of deadly weapons," as contains a prohibition against bearing arms *openly*, is unconstitutional and void. *Nunn vs. The State. 1 Kelly*..... 250

17. So far as it prohibits the wearing of arms in a *concealed* manner, it is valid. *Ibid.*
18. A *scire facias* against bail is not such an original suit, within the meaning of the Constitution of Georgia, as to require it to be instituted in the County of the bail's residence. *Reed vs. Sullivan's Ex'r*, 1 *Kelly*..... 294
19. The Act of 1801, which authorizes three or more Justices of the Inferior Court to preside in all cases in which the Judges of the Superior Courts are parties, or interested, is not repugnant to the Constitution of Georgia. *Taylor vs. Smith*. 4 *Ga.*..... 133
20. "Criminal cases," as used in the first section, 4th art. of the Constitution, refers to acts or omissions in violation of *public laws*; and not of *local by-laws* of Towns or Cities. *Williams vs. The City Council of Augusta*. 4 *Ga.*..... 509
21. Equity causes are not embraced in that clause of the Constitution which requires defendants, in *all civil cases*, to be sued in the County where they reside. *Rice, Receiver, vs. Tarver et al.* 4 *Ga.*..... 571
22. No man can be a judge in his own case. *Milnor & Co. vs. The Ga. R. R. & Bkg. Co.* 4 *Ga.*..... 385
23. It is competent to a State Government to authorize the construction of wharves on navigable streams within its territorial limits, even below low-water mark; and the exercise of this power will not be deemed unconstitutional, because of its repugnancy to the power of Congress to regulate commerce—such power not having been exercised so as to affect the question before the Court. *The Mayor, &c. of Savannah vs. The State ex rel. Thos. Greene*. 4 *Ga.*..... 26
24. Under the Constitution of the U. S. have the State Legislatures any authority over offences relative to the counterfeiting of the current coin of the U. S.? Query. *Rouse vs. The State*. 4 *Ga.*..... 136
25. An Act, to be in derogation of common right, must be confined in its provisions to a particular individual, or set of men, separate and apart from the rest of the community. *Flint River Steamboat Co. vs. Foster*. 5 *Ga.*..... 194
26. The Legislature being the sovereign power in the State, while acting within the pale of its constitutional competency, it is the province of the Courts to interpret its mandates, and their duty to obey them, however absurd or unreasonable they may appear. *Ibid.*
27. If an Act of the Legislature is in contravention of the Constitution, either State or Federal, it is *ipso facto* void, but it must be a plain and palpable case. *Ibid.*

28. The laws of Georgia may be thus graduated with regard to their authority: 1st. The Constitution of the United States. 2d. Treaties. 3d. Laws of the United States, made in pursuance of the Constitution. 4th. Constitution of the State. 5th. Statutes of the State. 6th. Provincial Laws in force 14th May, 1776. 7th. The Common and Statute Laws of England in force in Georgia. *Ibid.*
29. The words of Magna Charta, that "no freeman shall be taken or imprisoned, or be disseized of his freehold or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed or passed upon or condemned but by lawful judgment of his peers, or by the law of the land," were intended to secure the individual from the arbitrary exercise of the powers of Government, unrestrained by the established principles of private right and individual justice. *Ibid.*
30. The Act of 1837, authorizing and requiring the Governor, Secretary of State, Surveyor General and Comptroller General, to correct errors in grants, and to issue alias grants: *Held*, to be unconstitutional, so far as the rights of others than the State and original grantee are concerned. *Hilliard vs. Doe ex dem. Connelly*. 7 Ga..... 172
31. In *England*, the sovereignty of the nation resides in the government; in this country, the supreme power is in the people. *Beall, Adm'x. vs. Beall and Beall*. 8 Ga..... 210
32. In *England*, the omnipotent authority of the Parliament is the *dernier resort* in all matters of difficulty and importance; in this country, the written Constitution. *Ibid.*
33. The General Assembly in this State has power to make all laws and ordinances which they shall deem necessary and proper "for the good of the State," provided they are not repugnant to the Constitution of the United States, the laws of Congress passed pursuant thereto, Public Treaties, and the Constitution of the State. *Ibid.*
34. To disregard the laws of the State, is a capital crime against society; and great vigilance is necessary to see to it, that they are equally respected by those who govern, as well as those who are destined to obey. *Ibid.*
35. Notwithstanding the Judiciary is the weakest of the three departments of the Government, and is therefore, less dangerous to public liberty than either of the other two, still, it is both the right and duty of *all* Courts to declare all Acts void, which plainly and palpably violate the Constitution. *Ibid.*
36. Remark of Mr. *Elias Boudinot* on this subject. *Ibid.*

37. An individual's right to his property consists, not only in its present enjoyment, but also its future disposition; and he can be deprived of neither, except for public use, without his consent. *Ibid.*
38. A private Act of the Legislature, as to its facts and recitals, imports verity, equally with the records of the Courts; still, it may be attacked for fraud in its procurement. *Ibid.*
39. The power of the Legislature to pass an Act, changing the law of descents, as it respects a particular individual, without his consent and against his will, is contrary, not only to the definition of law as a "rule of civil conduct," applicable to the whole State, but to the genius and spirit of our institutions. *Ibid.*
40. The Legislature of Georgia, and not the Courts, are invested with the discretion of determining what laws are promotive of the public morality, or otherwise. *Ibid.*
41. The Constitution declares, that the three powers of the Government, viz: the Legislative, Executive and Judiciary, shall be distinct; still the separation is not, and from the nature of the case, cannot be total. *Ibid.*
42. Whether the sanction of the Executive is necessary to an Act before it can become a law in this State? *Quere. Ibid.*
43. The Constitution might have conferred upon any one or more of these branches powers which, in their nature, would more appropriately have belonged to another. *Ibid.*
44. In the absence of any provision upon the subject, the power to legitimate bastard children, and to change the rules of inheritance, would belong necessarily, to the Legislature. *Ibid.*
45. All departments of the government should be considered as equally honorable, useful, and patriotic; neither attempting to disparage, or entertaining any undue sensitiveness or jealousy toward the other, nor suspect encroachments where none were intended. *Ibid.*
46. Measures, exclusively of a political, legislative or executive character, are not examinable by the Courts. In such case, the remedy for any real or supposed abuse is solely by appeal to the people at the elections. *Ibid.*
47. The judicial authority is the final and common arbiter, under the distribution of power by the Constitution, of all questions which, from their nature, require and admit of legal investigation and decision. *Ibid.*

48. The friends of republican government and public liberty have uniformly denounced and rebuked, in the strongest terms, the usurpation of judicial powers by the Legislature or Executive, as constituting the very essence of tyranny and despotic government. *Ibid.*
49. Where two individuals claim the right to the office of Clerk of the Court of Ordinary, and one of them obtains a commission from the Governor, it is competent for the Judiciary to go behind the commission, and inquire into the validity of the election, and decide the rights of the contesting parties, notwithstanding the Governor may have issued a commission to one of them, from the evidence before him. *The State ex rel. Lowe vs. Towns, Governor. 8 Ga..... 360*
50. The issuing of the commission is merely a ministerial act required by law, and not a duty enjoined by the Constitution, and it is therefore only *prima facie* evidence of title to the office, but not *conclusive*. *Ibid.*
51. However clear it may be as a general *legal* proposition, that where a mere ministerial act is required to be performed by law, on the part of an executive officer, and individual rights depend on the performance of that act, that the proper tribunals of the country have jurisdiction to compel its performance, yet, for *political* reasons alone, the Chief Magistrate of the State cannot be compelled, by *mandamus*, to perform such ministerial act. *Ibid.*
52. Where the relator, applying for a *mandamus nisi* against the Governor, to issue to him a commission as Clerk of the Court of Ordinary, had failed to establish his title to the office, by the judgment of a Court of competent jurisdiction: *Held*, that according to relator's own showing, the Court had no jurisdiction to award the *mandamus nisi*. *Ibid.*
53. A legislative exposition of a doubtful law, is the exercise of a judicial power; and if it interferes with no vested rights—impairs the obligation of no contract, and is not in conflict with the primary principles of our social compact—it is in itself harmless, and may be admitted to retroactive efficiency. But if rights have grown up under a law of somewhat ambiguous meaning, it cannot interfere with them. *McLeod vs. Burrows. 9 Ga..... 218*
54. The constitutionality of the Acts of the Legislature of 1832-'3, authorizing the Governor to appoint a receiver to take charge of the assets of the Bank of Macon, and clothing him with power to maintain all suits, &c. affirmed. *Carey, assignee, vs. Giles. 9 Ga..... 258*
55. The appointment of a receiver by the Legislature, to settle the affairs of an insolvent bank, is not a Judicial Act. *Ibid.*

56. The solemn Act of the Government will not be set aside by the Courts, in a doubtful case. The incompatibility or repugnancy between the Statute and the Constitution, must be clear and palpable. *Ibid.*
57. Acts of a Legislature, constitutionally organized, are to be presumed constitutional, and it is only when they manifestly infringe some of the provisions of the Constitution, or violate the rights of the citizen, that their operation should be impeded by judicial power. Whenever this does happen, from inadvertency or any other cause, it becomes the duty of the Court to protect the citizen, and vindicate the Constitution. *Ibid.*
58. A Statute passed for the suppression of fraud, or to give a more speedy remedy for the recovery of a right, ought to be construed liberally—such construction being for the furtherance of justice. *Ibid.*
59. The constitutionality of the Act of 1850, authorizing the trial of slaves before the Superior Court, sustained. *Anthony vs. The State.* 9 Ga. 264
60. Where no time is fixed for the operation of a Statute, it takes effect from its passage; and ignorance of an Act is no legal excuse for its violation. *Heard vs. Heard.* 3 Ga. 380
61. The Supreme Court has the right to decide upon the constitutionality of an Act of the Legislature. *Winter vs. Jones.* 10 Ga. 190
62. Courts have nothing to do with the wisdom, policy or expediency of a law. These are matters purely of legislative deliberation and cognizance. *Ibid.*
63. It is the duty of Courts to put such a construction upon Statutes, if possible, as to uphold them and carry them into effect. *Ibid.*
64. Where a suit was commenced against two defendants, residing at that time in Marion County, and before trial and judgment, the new County of Macon was created, embracing that portion of the territory of Marion on which the defendants resided, and no provision was made in the Act for the transfer of suits from the old to the new County: *Held*, that by operation of law, under the provisions of the Constitution, the new County of Macon was the proper County for the trial of the cause; that being the County wherein the defendants resided. *Perkins, Hopkins and White et al. vs. Patten.* 10 Ga. 241

II. LAWS IMPAIRING THE OBLIGATION OF CONTRACTS.

1. The "alleviating laws" which postponed the collection of debts, did not so impair the obligation of the contract, as to render them unconstitutional. *Grimball vs. Ross. T. U. P. Charl.*..... 175
2. A State law, which impairs the obligation of a contract, made *prior* to its passage, is unconstitutional and inoperative. *Forsyth vs. Marbury. R. M. Charl.*..... 324
3. And it is equally so, whether the contract exists in its original shape or has been merged in a judgment. *Ibid.*
4. A Statute of Limitations, to be constitutional, must give an allowance of time, *in futuro*, in which to commence the action. *Ibid.*
5. A law which prohibits a levy on a portion of the debtor's property, previously subject to an existing judgment, is unconstitutional, as it *impairs the obligation* of a contract. *Ibid.*
6. An Act of the Legislature of Georgia, passed in 1834, appointed the Mayor and Aldermen of Savannah Commissioners of the jail of Chatham County, with power to appoint a jailer. The custody of the jail, prior to the passage of this Act, was vested, by law, in the Inferior Court and Sheriff of the County. The Corporation having appointed a jailer, the Sheriff, who had been elected before the passage of the Act of 1834, refused to deliver up the jail, on the ground that the Act was unconstitutional, so far as it applied to him: *Held*, that the Act was constitutional, and did not impair the obligation of contracts. *State vs. Dews. R. M. Charl.*..... 397
7. Public officers are but the naked agents of the body politic, and act only for its benefit. Such officers have no proprietary interest in their offices; and their duties, and rights which are the mere consequences of such duties, may be changed by the Legislature during their continuance in office, without impairing the obligation of a contract. *Ibid.*
8. Laws passed in the ordinary exercise of the legislative powers of a State, are not *contracts*, within the purview of the Constitution of the United States. *Ibid.*
9. And laws which repeal or amend them, do not fall beneath the constitutional inhibition. *Ibid.*
10. The Act of 21st December, 1843, authorizing grants to issue to certain persons, on the conditions therein named, to any ungranted lot of

- land in the several Counties mentioned therein, is constitutional. *Brinsfield vs. Carter*. 2 *Kelly*,..... 146
11. The right of the fortunate drawer in a land lottery, to the grant, on paying the fee, is not such a *contract* as comes within the purview of the Constitution. *Ibid*.
12. The charter of the Irwinton Bridge Company is not a violation of the 10th section of the 1st article of the Constitution U. S. prohibiting laws which impair the obligation of contracts. *Young vs. McKenzie, Harrison et al.* 3 *Kelly*,..... 38
13. The Act of 1840, which provides for the appointment of a receiver of assets of banks which had forfeited their charters, and the Acts amendatory thereof, are *remedial* in their character, and do not contravene the provision of the Constitution, with reference to the obligation of contracts. *Hall et al. vs. Carey, Assignee*, 5 *Ga.*..... 239
14. Where a person obtains a license to retail liquors, for twelve months, from the Clerk of the Inferior Court, and pays the fee, the corporate authorities of a City Council, by an Ordinance enacted *subsequent* to the date of such license, cannot impair the rights of the party, acquired under the law, as it stood when such license was granted. *Mayor, &c. Rome vs. Lumpkin et al.* 5 *Ga.*..... 447
15. A private corporation is a contract between the Government and the corporators, and the Legislature cannot repeal, impair or alter the rights and privileges conferred by the charter, against the consent and without the default of the corporation, judicially ascertained, in a proceeding instituted by the Government, directly for that purpose. *Young vs. Harrisons*, 6 *Ga.*..... 130
16. The remedy, the mode and manner of enforcing contracts, is no part of their obligation, and is within the legislative control. *Carey vs. Giles*. 9 *Ga.*..... 253
- See, also, *Griffin vs. McKenzie and another*. 7 *Ga.*..... 263
17. The Legislature or the Inferior Court, as its agent, after having chartered a company to make a particular improvement for public accommodation, without any provision that no rival improvement should afterwards be authorized, may grant a charter to another company or individual, to make an improvement of the same or of a different kind, to afford the like accommodation, however the work of the junior company might impair or even destroy the profits of the elder. *Shorter et al. vs. Smith et al.* 9 *Ga.*..... 517
18. The Supreme Court has the right to decide upon the constitutionality of an Act of the Legislature. *Winter vs. Jones*. 10 *Ga.*..... 190

19. The objection to a law, on the ground that it impairs the obligation of a contract, does not depend upon the extent of the change which the law may make in it. *Ibid.*
20. Any deviation from its terms, by imposing conditions not expressed in the contract, however minute or apparently immaterial in their effect, is within the constitutional prohibition. *Ibid.*
21. A contract entered into between the State and an individual, is as fully protected by this prohibition, as a contract between two individuals. *Ibid.*
22. A constitutional Act of the Legislature is equivalent to a contract, and when performed, is a contract executed. And whatever rights are thereby created, a subsequent Legislature cannot impair. *Ibid.*
23. Where, by the charter incorporating the City of Rome, which gave power and authority to the Mayor and Council, to pass all by-laws and ordinances that should appear to them necessary and proper, for the security, welfare and interest of said City, or for preserving the peace, health, order and good government thereof, and also to authorize said Mayor and Council to license persons to retail spirituous liquors within the said City: *Held*, that it was competent for said Mayor and Council to pass an ordinance to prohibit the retail of spirituous liquors, by those to whom license had been granted within the City, after the hour of ten o'clock at night; such ordinances not essentially *impairing* the right to retail under the license granted, but only *regulating* the exercise of it, for the benefit of the peace, order and good government of the City. *Erastus Morris vs. the City Council of Rome.* 10 Ga. 532

See *Continuance*, 20 ; *Grant*.

III. EX POST FACTO AND RETROSPECTIVE LAWS.

1. The clause in the Constitution of the United States prohibiting *ex post facto* laws, applies to criminal cases alone. *Wilder vs. Lumpkin.* 4 Ga. 209
2. Retrospective laws, which do not impair the obligation of contracts, are not unconstitutional. *Ibid.*
3. And will be enforced, unless they violate the great fundamental principles of the social compact. *Ibid.*
4. If they divest previously acquired rights, they will not be enforced. *Ibid.*

5. Retrospective laws which act upon the remedy alone, will be enforced, if not within the above provisoes. The Act of 29th Dec. 1847, in relation to parties to writs of error, is not within either of these provisoes. *Ibid.*
6. A legislative exposition of a doubtful law, is the exercise of a judicial power; and if it interferes with no vested rights, impairs the obligation of no contract, and is not in conflict with the primary principles of our social compact, it is, in itself, harmless, and may be admitted to retroactive efficiency. But if rights have grown up under a law of somewhat ambiguous meaning, it cannot interfere with them. *McLeod vs. Burroughs.* 9 Ga..... 213
7. The Escheat Laws may apply to cases previously occurring, and still not be unconstitutional. *White vs. Wayne. T. U. P. Charl.*..... 108

IV. LAWS TAKING PRIVATE PROPERTY FOR PUBLIC USES.

1. Private property cannot be taken for public use, without a just compensation; and where a railroad charter provides, that adequate security shall be given to the land-holder, whose land shall be taken for the use of the road, for the payment of such damages as shall be assessed in the manner pointed out thereby, no title to the land thus taken vests in the company, nor can the company appropriate the same to the *exclusive use* of the road, so as to defeat the right of the land-holder to maintain trespass in ejectment therefor, until such adequate security shall be given; and it is incumbent on the company to allege in their plea, and prove at the trial, that the provisions of their charter in that respect, have been strictly complied with, before the land-holder can be deprived of his title to his property, for the use of the public. *The Lessee of Carr vs. The Ga. R. R. & Bkg Co.* 1 Kelly..... 537
2. The 5th art. of the amendments of the Constitution U. S. which declares that "private property shall not be taken for public use, without just compensation," does not create any new principle of restriction on either the National or State Governments, which did not exist before, but was declaratory of a great Common Law principle, applicable to all republican governments, and which existed anterior to the adoption of the Constitution. *Young vs. Harrisons.* 3 Kelly. 41
3. The right of *eminent domain* or inherent sovereign power, gives to the Legislature the control of private property for the use of the public, provided just compensation be made the citizen therefor; and all grantees of land from the State, and their assigns, hold the same under this tacit agreement or implied contract. *Ibid.*

4. It belongs to the Legislature to determine what objects are 'of such public importance as to justify the exercise of the right of *eminent domain*. *Minims vs. Macon & Western R. R.* 3 *Kelly*..... 333
5. This right may be exercised through the medium of corporate bodies or by means of individual enterprize. *Ibid.*
6. Agents, Surveyors, &c. may enter upon the lands of individuals, for the purpose of making examinations, &c. previous to the assessment and payment of damages, but just compensation must be made before the fee can vest. *Ibid.*
7. Whenever just compensation is made, or *tendered and refused*, and all the *conditions precedent* prescribed by the Legislature, are performed, the Constitution is complied with, and the property may be lawfully appropriated. *Ibid.*
8. In case of actual necessity, to prevent the spreading of a fire, or any other great public calamity, the private property of an individual may be taken and used or destroyed, for the relief or protection of the many, without subjecting those who act by order of the constituted authorities, to personal liability. *Bishop and Parsons vs. The City of Macon.* 7 *Ga.*..... 200
9. But where the private property of an individuul, the whole or part of which might have been saved to the owner, is taken or destroyed for the benefit of the public, those for whose supposed benefit the sacrifice was made, ought, in equity and justice, and are bound under the Constitution of the United States, to make good the loss which the individual has sustained *for the common benefit*. *Ibid.*
10. Where the same extent of loss would have been sustained, as the necessary consequence of the fire or other public calamity, if the property had not been thus destroyed, it would seem that in such case the sufferer has no equitable claim to compensation. *Ibid.*
11. The Act of 1834, authorizing the Inferior Court to grant the right of private ways, in certain cases, containing no provisions for making any just-compensation to the owners of the land through which it might pass: *Held*, to be unconstitutional and void. *Brewer vs. Bowman.* 9 *Ga.*..... 37
12. Private property may be taken for public use, without compensation, in cases of extreme necessity, without the consent of the owner—*e. g.* pulling down houses to raise bulwarks, &c. *Parham vs. The Justices, &c.* 9 *Ga.*..... 361
13. The general rule is, that private property cannot be taken for public

use, without just compensation, and then only by an Act of the Legislature, making provision for compensation. *Ibid.*

14. The Legislature must judge of the necessity or utility of the exercise of the right of eminent domain, for public improvements; but in case of great abuse of it, as when under pretext of public utility, the property of A is taken and given to B, the Courts will interfere and set aside the law. *Ibid.*
15. The provision of the Federal Constitution, that prohibits the taking of private property for public use, without just compensation: *Held*, to be an affirmation of a great principle of the Common Law. *Ibid.*
16. The laws of this State, which authorize the opening of public roads over unenclosed lands, without just compensation: *Held*, to be void. *Ibid.*
17. The value of land taken for public use, is not restricted to its agricultural or productive qualities; but inquiry may be made as to all other legitimate purposes to which the property could be appropriated. *Harrisons vs. Young.* 9 Ga..... 359
18. For an interference with his private right of ferriage, the owner is entitled to compensation. *Ibid.*
19. The Legislature, or the Inferior Court as its agent, after having chartered a company to make a particular improvement for public accommodation, without any provision that no rival improvement should afterwards be authorized, may grant a charter to another company or individual, to make an improvement of the same, or of a different kind, to afford the like accommodation, however the work of the junior company might impair, or even destroy the profits of the elder. *Shorter et al. vs. Smith et al.* 9 Ga..... 517
20. It is competent for the Legislature to grant charters with exclusive privileges, but should a change in the business, population, and intercourse of the country require it, new avenues may be opened within the limits of such exclusive grants, by providing just compensation. *Ibid.*
21. There is no difference between a franchise and any other property in this respect; all may be made subservient to the public use, provided the public faith be not violated in making adequate remuneration. *Ibid.*

See *Bridges*, 3 to 8.

V. LAWS AFFECTING TRIAL BY JURY.

1. The Superior Courts have final and exclusive jurisdiction of all indictable offences; and no corporate Court can take cognizance of and punish therefor—thereby excluding the party from all trial by Jury. *State vs. Mayor, &c. Savannah. T. U. P. Charl.*..... 237
2. The provision in the Constitution of Georgia, which directs that “trial by Jury, as heretofore used in this State, shall remain inviolate,” does not apply to a summary jurisdiction (such as Commissioners of Pilotage) existing in Georgia, before the adoption of the Constitution, and recognized by contemporaneous legislation, judicial exposition and continual acquiescence. *Low vs. Commissioners of Pilotage. R. M. Charl.*..... 302
3. The Act of 1833, giving the State half the number of challenges allowed the prisoner in criminal cases, is constitutional; the right of trial by Jury, as used in Georgia prior to the adoption of the Constitution, is in no wise impaired by that Act. *Jones vs. The State. 1 Kelly* 616
See also, *K. P. Boon vs. The State. 1 Kelly*..... 619
And *Hudgins vs. The State: 2 Kelly*..... 180
4. The Act of 1843, prescribing the questions to be propounded to a Juror upon his *voire dire*, is constitutional and valid. *K. P. Boon vs. The State. 1 Kelly*..... 619
5. “Trial by Jury as heretofore used,” refers not to *pecuniary penalties* imposed by municipal corporations. *Williams vs. The City Council, &c. 4 Ga.*..... 509
6. The Act of 1796, authorizing the Inferior Court to issue execution against depositaries of public moneys, without trial by Jury, is constitutional, so far as refers to money belonging to the public. *Tift et al. vs. Griffin. 5 Ga.*..... 185
7. But is unconstitutional, as to all others, than Collectors, Receivers, or other legally appointed public agents. *Ibid.*
8. “Trial by Jury, as heretofore used, shall remain inviolate,” means, that it shall not be taken away in cases where it existed, at the adoption of the Constitution, and not that there must be a Jury in all cases. *Flint River Steamboat Co. vs. Foster. 5 Ga.*..... 194
9. An Act of the Legislature, authorizing a judgment to be rendered, without the intervention of a Jury, is not, on that account, unconstitutional. *Ibid.*

10. Trial by Jury may be clogged with onerous conditions, without the Act being unconstitutional, unless it totally prostrates the right, or renders it wholly unavailing. *Ibid.*
11. The Acts of 1841 and 1845, giving summary remedies against steam-boats and other water-craft, on the Chattahoochee, and other rivers, are constitutional. *Ibid.*

VI. LAWS CONTAINING MATTER DIFFERING FROM THE TITLE.

1. The Constitution of Georgia declares, that no bill or ordinance shall pass, containing any matter different from what is expressed in the title thereof: *Held*, that although, under this clause, so much of a Statute as contains matter different from what is expressed in the title thereof, will be void, yet, that it was enough, if the title was descriptive, generally, of the purposes of the Act; and that it was not necessary that it should particularize the several provisions and amendments contained in the body of the Act. *Green vs. the Mayor, &c. R. M. Charl.*..... 368
2. The provision prescribing the mode of obtaining letters dismissory, in the Act of 1810, entitled "an Act more effectually securing the probate of wills, limiting the times for executors to qualify, and widows to make their election, and for other purposes therein mentioned," is within the subject matter of the Act, expressed in the title, and is constitutional. *Smith and Wife vs. Oliver, Adm'r. Dudley*..... 190
3. A Statute, where the body of the Act contains matter different from its title, is unconstitutional and void, only as to such matter. *Mayor, &c. Savannah, vs. The State. 4 Ga.*..... 26
4. The history of this clause of the Constitution. *Ibid.*..... 38
5. The 17th section, 1st article, of the State Constitution, inhibiting the passage of any law by the Legislature, containing any matter different from what is expressed in the title, does not require that the title should set out a synopsis of the entire Act. *Martin, Adm'rx, vs. Broach, Ex'r. 6 Ga.*..... 21
6. Where the title specifies some of the objects of the Statute, and contains this general clause, "and for other purposes therein contained," portions of the Act, not specifically indicated in the title, are nevertheless good, under this general clause. *Ibid.*

VII. LAWS IMPOSING TAXES.

1. An ordinance of the City Council of Savannah, passed under the authority of an Act of the Legislature, imposed a tax on all goods, &c.

not the produce of the State, sold on commission, by any person residing within the City: *Held*, that such tax was not an impost or duty on imports, but that it was a legitimate exercise of the power of a State to regulate its internal commerce. *Cumming vs. The Mayor, &c. R. M. Charl.*..... 26

2. The same ordinance required the City Treasurer, in default of any person, to make his return of such sales, within the time prescribed, to assess the value of goods sold by said defaulter, from the best information he could obtain, and to issue his warrant of distress for the amount of such assessment: *Held*, that such arbitrary assessment was violative of private right, unauthorized by the State law and unconstitutional. *Ibid.*

3. Where a person obtains a license to retail spirituous liquors for twelve months, from the Clerk of the Inferior Court, according to the provisions of the Act of 1809, and pays a valuable consideration therefor, the corporate authorities of a City Council, by an ordinance enacted *subsequent* to the date of such license, cannot, within the limits of the same County, impose and collect any additional tax, or impair the rights of the party, acquired under the law, as it stood at the time such license was granted. *Mayor, &c. Rome, vs. Lumpkin et al.* 5 Ga. 447

4. By the terms of the charter of the City of Augusta, the Council have "full power and authority to make such assessments on the inhabitants of the City, or those who hold taxable property therein, for the safety, benefit, convenience and advantage of the said City, as shall appear to them expedient:" *Held*, that the assessment of a tax on the value of real estate, within the corporate limits, for the purpose of constructing a canal, for the better securing an abundant supply of water for the City, is not a violation of the charter, nor contrary to the laws of this State. *Frederick vs. The City Council.* 5 Ga..... 561

5. A charter authorizing a municipal corporation to tax real and personal estate, does not necessarily confer the right to tax income. *The Mayor, &c. vs. Hartridge.* 8 Ga..... 23

6. Statutes levying taxes, should be construed, most strongly, against the government, and in favor of the citizen. *Ibid.*

CONTEMPT.

1. Where the Superior Court, upon *certiorari*, ordered an inferior Court, (The Mayor, &c. of Savannah,) to suspend inflicting a penalty, for an alleged breach of the Quarantine Laws, which order was disobeyed: *Held*, that the inferior Court was guilty of a contempt, and that it is no excuse for them to question the validity of the order of the Superior Court, or the jurisdiction of the Court, in passing it. *The State vs. Noel, Mayor, &c. T. U. P. Charl.*..... 43
2. All Courts of record have power to commit for a contempt. *The State vs. White. T. U. P. Charl.*..... 136
3. The Superior Court will not discharge, upon *habeas corpus*, persons committed for a contempt of an inferior Court; and especially, will not discharge or admit to bail, officers of such inferior Courts, committed for a contempt against them. *Ibid.*
4. An attachment, for a contempt, will issue against the Justices of the Inferior Court, sitting as a Court of Ordinary, for evading or refusing to carry out the judgment of the Superior, upon an appeal from the Court of Ordinary. *Ex parte Carnochan. T. U. P. Charl.*..... 315
5. An evasive and insufficient return to the writ of *habeas corpus*, is a contempt of the Court; and if obstinately persisted in, will be punished by imprisonment. *State vs. Frazer. Dudley*..... 43
6. It is a contempt of Court, if the Jurors, after they have retired to decide on a criminal case, hold communication with persons other than the officers of the Court. *State vs. Helvenston et al. R. M. Charl.*.... 48
7. So, if one Juror separates himself from the others, and mingles with the community at large. *Ibid.*
8. Where a judgment of *ouster* had been awarded against P, on a *quo warranto*, who claimed to hold the office of Clerk of the Court of Ordinary, under an election made in January, 1849, and *subsequent* to the judgment of *ouster*, P was again elected to the same office by the Justices of the Inferior Court, and exercised the duties of the office under the new appointment, *exclusively*: *Held*, that P was not in contempt of the judgment of the Court, upon the *quo warranto*, removing him from office under the *first* appointment, the new appointment not having been declared invalid, by any appropriate judicial proceedings instituted for that purpose. *Pyron vs. The State ex rel. Lowe. 8 Ga.*..... 230

See Attachment. V.

CONTINUANCE.

1. A defendant has the right to demand the trial of a cause, unless it can be continued on legal grounds; and the Court will not continue it, from motives of delicacy, in opposition to such right. *Simons vs. Sheftall. R. M. Charl.*..... 90
2. It is not sufficient ground for continuance, that the presiding Judge had, in another capacity, expressed an opinion on one of the points involved. *Ibid.*
3. The entry on the Bench docket of two general continuances, without anything appearing, upon the minutes of the Court, will not work a *discontinuance*, so as to entitle the defendant to a judgment of *non pros.* under the Law and Rules of Practice in this State. *Nisbet vs. Lawson. 1 Kelly*..... 279
4. Error does not lie, for the refusal to grant a continuance, unless it is a most plain and palpable case of the arbitrary and oppressive exercise of the discretion necessarily vested in it by law. *Sealy vs. The State. 1 Kelly*..... 215
5. The rejection of the admissions of one member of a firm, going to charge the others, on the ground that the partnership was not established, is not such a surprise as will entitle a party to a continuance, after the cause has been submitted to the Jury on the appeal. *McCutchin vs. Bankston. 2 Kelly*..... 245
6. The Supreme Court will not continue a case for any, except Providential cause, such being the requisition of the Constitution. *Carey, Assignee, vs. Rice, Receiver. 2 Kelly*..... 411
7. A cause not reached by the Court, at the term, stands over as a case continued. *Smith, Adm'r. vs. Thompson. 3 Kelly*..... 26
8. The improper granting or refusal of a continuance, is ground for a writ of error. *McDougald vs. The Central Bank. 3 Kelly*..... 188
9. Upon a motion for a continuance on account of the absence of a material witness, the Court may compare the facts expected to be proved, with the plea, and decide whether or not the testimony is material. *Ibid.*
10. The miscarriage of the mail is no ground for the continuance of a

- cause in the Supreme Court, unless shown to be from Providential cause. *Shackelford vs. Hays*. 3 *Kelly*..... 416
11. The Supreme Court will control the discretion of the Court below, in refusing to grant a continuance in a criminal cause, where manifest injustice has been done the defendant. *Howell vs. The State*. 5 *Ga.* 48
12. The absence of a witness, the object of whose testimony is, to impeach another witness expected to be introduced by the State, is good ground for a continuance; but if the witness on the part of the State is not introduced, the Court will not grant a new trial, notwithstanding the motion for a continuance was refused. *Studstill vs. The State*. 7 *Ga.*..... 2
13. Where a defendant, indicted for murder, makes a motion to continue his cause, on the ground of the absence of two material witnesses, who had been subpoenaed, it is no error for the Court to postpone the trial, and compel the attendance of the witnesses, by the process of the Court. *Reese vs. The State*. 7 *Ga.*..... 373
14. Where a defendant, indicted for murder, moves the Court to continue his cause, on the ground that there was great excitement and prejudice against him in the public mind, so that he could not have a fair trial; and to support his own affidavit, introduced two witnesses, who contradicted the defendant's statements as to such public excitement: *Held*, that it was no error in the Court to refuse a continuance. *Ibid.*
15. The 4th Common Law Rule of Practice, which authorizes a continuance on appeal trials, for the purpose of making a substantial amendment, to either declaration or answer, does not apply to Equity causes. *Berry et al. vs. Matthews et al.* 7 *Ga.*..... 457
16. Where the offence has been recently committed, and the party accused imprisoned during the whole time which intervened between his arrest and trial, it is good cause of continuance, in a capital case, at the first term after the bill is found, that the defendant cannot come safely to trial, on account of the excitement in the public mind against him; and the affidavit of the prisoner, when made and filed in terms of the law, cannot be contradicted or traversed, either by a cross-examination or *aliunde* proof. *Bishop vs. The State*. 9 *Ga.*..... 121
17. A defendant, in a criminal cause, at the 2d term, moves to continue, on the ground that a material witness was absent, who had been subpoenaed and recognized to appear, and his expenses tendered to him, and that he expected to prove by him, that one of the witnesses expected to be introduced and relied on by the State, said "that if hard

swearing would send defendant to the penitentiary, he should go:" *Held*, that the showing was sufficient. *Fox vs. The State*. 9 Ga.... 373

18. It is competent for the Court to refuse a continuance, after a legal showing has been made, upon the ground of the Court's private knowledge of the good character of the witness sought to be impeached by the testimony of the absent witness, and the Court's want of confidence in the integrity of the party moving the continuance. *Ibid*.
19. The question discussed, whether, when a person is arrested and committed for an offence, he is entitled to compulsory process to secure the attendance of witnesses before true bill found? Quere. *Allen vs. The State*. 10 Ga..... 85
20. Does the 8th article of amendments to the Constitution U. S. confer any new right in this respect? Quere. *Ibid*.
21. Notwithstanding a party charged with a crime may have compulsory process for his witnesses, even before indictment found, still, the omission to use it, is not such negligence as will deprive him of a continuance, if the witnesses are absent. *Ibid*.
22. To entitle the accused to the aid of the Court, he should be guilty of no *laches*, but show due diligence on his part. *Ibid*.
23. The mere absence of an attorney without the consent of the client, is not a sufficient ground for the continuance of a cause. *Ibid*.
24. The absence of counsel is not a *favoured* excuse for not proceeding to trial; on the contrary, excuses of this sort ought to be discountenanced. *Ibid*.
25. It is the duty of counsel to attend, and the failure to do so, is no cause for postponement, except in cases of *necessity* or *misconception*. *Ibid*.
26. The rule applies to attorneys *in fact* as well as *at law*. *Ibid*.
27. The Courts are strict in granting continuances on account of the absence of counsel. *Ibid*.
28. Illness of counsel, where there is but one, or of the leading counsel, where there are more than one, is a sufficient ground for the continuance of a cause, especially where the sickness is so sudden that another cannot, under the circumstances, do justice to the cause. *Ibid*.
29. The affidavit for a continuance should be full, satisfactory and direct, as to the material allegations necessary for a continuance. *Ibid*.

30. It should state that there is no other witness present by whom the party can satisfactorily prove the same facts; that the attendance of the absent witness is expected at the next term, and that the facts expected to be proven would be admissible as evidence; and that the witness resided within the jurisdiction of the Court. *Ibid.*
31. In the application of rules for the continuance of criminal causes, the presiding Judge must be left free, to some extent, to act in such a manner as will secure a *speedy*, as well as a *fair trial*. *Ibid.*
32. Where the Court suspects that the object of the party in asking a continuance, is delay merely, has the Court the right to travel out of the written affidavit? *Quere. Ibid.*
33. A continuance will not be granted in the Supreme Court, when the original counsel are before the Court. *Bullock vs. The State. 10 Ga. 46*

CONTRACTS.

- I. GENERALLY; VALID AND VOID.
- II. AS AFFECTED BY THE STATUTE OF FRAUDS.
- III. CONSTRUCTION OF.
- IV. SUITS UPON.
- V. REFORMATION AND RESCISSION OF—SEE *EQUITY. I. e.*

I. GENERALLY; VALID AND VOID.

1. A promise upon no *new consideration*, to execute a bond to indemnify a co-security against loss, is void, if made after the liabilities of *all the parties* to the instrument have been incurred. *Jones vs. Shorter et al. 1 Kelly..... 297*
2. An instrument as follows: "We have this day sold to J. L. & Co. our entire crop of cotton, at 9 cents per lb. all round, and should they not realize that amount, net, we agree to make good the loss (signed) D. M. L., F. D. W." is the joint undertaking of the makers, and is sufficiently certain and reciprocal to support an action by either of the parties against the others. *Jernigan et al. vs Wimberly. 1 Kelly..... 221*
3. The rule as to certainty is, that the agreement must be so certain and complete that each party may have an action upon it. *Ibid.*

4. The omission of J. L. & Co. to subscribe the instrument, does not invalidate it; nor would that omission form any legal objection to an action against them, for the stipulated price of the cotton thereby sold and delivered. *Ibid.*
5. It is a general rule that fraud vitiates all contracts. *Coffee et al. vs. Newsom, Ex'r.* 2 *Kelly*..... 459
6. William Pelot conveyed by deed certain slaves to Levi S. DeLyon, in trust, for the sole and separate use of his wife, Elvira R. Pelot, during her life, and after her death, to her children. The deed authorized the *cestui que trust*, Mrs P. by and with the advice and consent of her trustee, to sell and dispose of the estate whenever she shall deem it proper to do so, and to re-invest the proceeds. Mrs. P. purchased from A. M. a tract of land, the growing crop thereon, and also the stock of cattle, and hired the services of three negroes belonging to M. for the sum of \$1,476. Two notes were given by her for the amount, to be secured by a mortgage on the four slaves embraced in the trust deed, and by a mortgage on the land: *Held*, that it was competent for Mrs. P. to make this contract. *Wayne, Trustee, et al. vs. Myddleton et al.* 2 *Kelly*..... 402
7. A contract made by a plaintiff in *fi. fa.* with the defendant, who is insolvent, to release him from a part of the judgment, in consideration that he will appropriate the yearly proceeds of his personal labor in payment of the balance, is a valid contract. *Merchants' Bank vs. Davis.* 3 *Kelly*..... 105
8. A promise made by a plaintiff in *fi. fa.* to a third person, that he would not levy his execution upon property bought by that third person from the defendant, and upon which its lien attaches, is void for want of consideration. *Ibid.*
9. Courts of Justice will not lend their aid to enforce an immoral or illegal contract; if it be executed, they will not disturb it, but leave the parties where they find them. *Howell, Adm'r, vs. Fountain et al.* 3 *Kelly*..... 178
10. No action can be maintained upon a contract growing out of an immoral or illegal transaction, when the transaction was not subsequent or collateral, but directly connected with the unlawful act. *Ibid.*
11. When an offer is made by letter, an acceptance by written reply takes effect from the time it is sent, and not from the time it is received by the other party. *Levy vs. Cohen.* 4 *Ga.*..... 1
12. Slight consideration is sufficient to sustain a contract, in a Court of Law. *Austell vs. Rice.* 5 *Ga.*..... 472

13. Forbearance to prosecute a claim, or the compromise of a doubtful right, is sufficient to sustain a contract. *Ibid.*
14. Fraud in the promisee, without damage to the promisor, is not sufficient to invalidate a contract *Ibid.*
15. The motive with which a party enters into a contract, is no part of the consideration. Hence, a disappointment of the motive, by the fraudulent misrepresentations of the promisee, is not a good defence. *Ibid.*
16. Mere inadequacy of price, or any other inequality in the bargain, does not constitute, *per se*, a ground of relief against the contract, either at Law or in Equity. *Robinson vs. Schly & Cooper.* 6 Ga..... 515
17. But where there are other ingredients in the case, of a suspicious nature, or peculiar relations between the parties, gross inadequacy of price must necessarily furnish the most violent presumption of fraud. *Ibid.*
18. By the Civil Law, sales of immovable property were set aside where the inadequacy of price amounted to one-half the value. This rule did not, by that code, apply to personalty; and the Common Law has fixed no definite proportion as the test of inadequacy. *Ibid.*
19. Money paid by *mistake of law*, may be recovered back in an action for money had and received, where there is a full knowledge of all the facts: *Provided*, the mistake is clearly proven, and the defendant cannot, in good conscience, retain it. *Culbreath vs. Culbreath.* 7 Ga. 64
20. A, being insolvent and largely indebted to B, conveys certain property to C, to be held *in trust* for the use of A and his family. Afterwards he agrees with B, in consideration of a full discharge, to turn over to him all his property, real and personal, and his rights of property, and accordingly did, excepting that conveyed to C: *Held*, that the agreement between A and B is a contract of sale, and the title to the property conveyed to C, vested in B. *Woodard et al. vs. Solomon, Ex'r.* 7 Ga..... 246
21. The contracts of infants are not void, but voidable, at the election of the infant, when arriving at full age. *Strain vs. Wright.* 7 Ga.. 568
22. When an infant purchases property, gives his note for the purchase money, and receives the property into his possession; and after arriving at full age, disaffirms the contract, by plea of infancy to a suit upon the note: *Held*, that the title to the property re-vested in the vendor, or his legal representatives, and that the infant should restore the property to the owner, upon a disaffirmance of the contract. *Ibid.*

23. Where an infant had purchased a negro, and paid part of the purchase money, and gave his note for the balance, and took the negro into his possession; and afterwards, to a suit instituted on the note by the vendor, he disaffirmed the contract by a plea of infancy: *Held*, that inasmuch as the remedy of the vendor, under the peculiar facts of the case, to secure the possession of the negro, at Law, was inadequate and difficult, a Court of Equity would entertain jurisdiction, and decree a sale of the negro; and out of the proceeds thereof, reimburse the infant the amount paid by him, and decree the balance to the vendor or his legal representative. *Ibid*.
24. A agrees with B that he shall have the deputation of the Clerkship of the Inferior Court, and receive for his compensation, the fees and costs of the office, already accrued, and which are to accrue, and B agrees to pay A therefor, out of said fees, due and to accrue, the sum of five hundred dollars, and executes his notes for that sum: *Held*, that these notes are void, as against the Statute forbidding the sale of public offices, and as opposed to the policy of the law. *Grant and another vs. McLester*. 8 Ga..... 553
25. A contract for the sale of both *real* and *personal* property, which is *entire*, and founded on one and the same consideration, if void in part, is void *in toto*. Per *Lumpkin, J. Robson, Adm'r, vs. Harwell and Wife*. 6 Ga..... 589
26. If A make two propositions to buy goods of B, one in writing, the other in parol, B has the right to elect which he will accept; and if he accepts the written one, the writing is the only evidence of the contract. *Woolbright vs. Sneed*. 5 Ga..... 167
27. If the letter contains alternative propositions, the vendor has the right to elect, and an issue may be made before the Jury, as to which he did elect. *Ibid*.
28. A Sheriff cannot purchase, at his own sale, neither for himself nor as agent for another; such purchase is void. *Harrison vs. McHenry*. 9 Ga..... 164
29. A bond, by an administrator, to convey real estate, in contemplation of an order to sell, by the Ordinary, is void, being contrary to the policy of the law. *Logan vs. Gigley*. 9 Ga..... 114
30. A contract in general restraint of trade, is void; but if in partial restraint of trade only, it may be supported, provided the restraint be reasonable, and the contract founded on a consideration. *Holmes vs. Martin*. 10 Ga..... 503
31. Where H sold to A a town lot, with a restriction that it should not be used as a tavern: *Held*, that the restriction was valid. *Ibid*.

32. A general conveyance may be limited by restrictive words in the same instrument. *Ibid*.

33. It is competent for the vendor to convey the fee to the vendee, and reserve certain rights to himself, his heirs and assigns. *Ibid*.

See *Bailment*.

II. AS AFFECTED BY THE STATUTE OF FRAUDS.

1. A promise, by one person, to indemnify another, for becoming security to a third, is not within the Statute of Frauds, and need not be in writing. *Jones vs. Shorter et al.* 1 *Kelly*..... 297
2. A parol contract, for the sale of goods to be delivered, and which the parties reasonably expected would be delivered within a year, though the price was to be paid after that period, is not within the Statute of Frauds, because all that is on one side to be performed, viz: the delivery of the goods, is to be done within the year. *Johnson vs. Watson.* 1 *Kelly*..... 351
3. If there have been a delivery, either actual or virtual, by the vendor, in pursuance of a verbal sale, he has lost the power of retraction, under the Statute of Frauds, if the vendee chooses to treat the contract as complete. *Ibid*.
4. The Statute of Frauds has no application to a contract which has been fully performed on both sides. *Ibid*.
5. Though a trust in land need not be created in writing, yet, to take the case out of the Statute of Frauds, it must be proved by writing, and parol testimony is inadmissible for that purpose. *Miller et al. vs. Cotton et al.* 5 *Ga*..... 341
6. Where a wife has a separate estate, and contracts an individual debt, a parol promise, by the husband, to pay the debt, is void, under the Statute of Frauds, because it is a promise to answer for the debt of another, and ought to be in writing. *Connerat vs. Goldsmith.* 6 *Ga*... 14
7. By the 4th section of the Statute of Frauds, the promise to answer for the debt of another person, must not only be in writing, but also the consideration of the agreement. Parol evidence is inadmissible, to prove a consideration *extrinsic* of the written agreement. *Henderson vs. Johnson.* 6 *Ga.* 390. *Wain vs. Walters*—considered and approved. *Ibid*.
8. Contracts for the sale of goods, wares and merchandize, are not ex-

cluded from the operation of the 17th section of the Statute of Frauds, because they are executory. *Cason vs. Cheely*. 6 Ga..... 554

9. Contracts for goods, not *in esse* at the time, and of a peculiar character, so as to be unsuited to the general market, to be made by the work and labor, and with the material of the vendor, at the instance of the purchaser, are not within the 17th section of the Statute of Frauds. *Ibid*.
10. But all such contracts as do not *primarily* contemplate work and labor to be done, or material to be furnished by the vendor, at the instance of the purchaser, and for his use and benefit, and in which work and labor are not *the essential* consideration, are within the Statute, although work and labor may be requisite to make the goods, or to fit and prepare them for delivery. *Ibid*.
11. Cotton prepared for market: *Held*, to be goods and merchandise, within the meaning of the 17th section of the Statute of Frauds. *Ibid*.
12. Treasury checks are neither goods, wares nor merchandize, within the 17th section of the Statute of Frauds. *Beers et al. vs. Crowell*. *Dudley* 29

III. CONSTRUCTION OF CONTRACTS.

1. Where there was a sale of 1500 bushels of salt, to be paid for at ninety days, it was held that an action could not be brought on the contract, until the expiration of the time. *Banks et al. vs. Carter et al*. *Dudley*. 92
2. Public agents, contracting in behalf of the public, are not individually liable. *Ghent et al. vs. Adams*. 2 *Kelly*..... 216
3. Where Justices of the Inferior Court sign a note, with the addition of the initials J. I. C. to their names, parol evidence is admissible, for the purpose of showing, (where there is any doubt,) whether the contract was in fact made in their individual or official character. *Ibid*.
4. In a contract to pay money, in which it is *expressly* stipulated that the instalments shall be paid at *specified times*, and that if any one instalment is not promptly met, the whole sum shall be due and payable, *time* is of the essence of the contract, and if the party agreeing to pay, fails to do so, he is not entitled to relief in Equity. *Sneed and another vs. Wiggins and another*. 3 *Kelly*..... 98
5. Where, in a contract between a railroad company and contractors, to build the superstructure on the track, the railroad company agree to furnish the materials, at the end of the finished work, and the

- contractors agree to complete the work in a specified time: *Held*, that by a fair interpretation of this agreement, the railroad company were bound to furnish the materials as fast as they were required by the contractors, and that if they failed to do so, they were liable to pay for the "lost time." *Milnor & Co. vs. The Georgia R. R. & B'k'g Co.* 4 Ga..... 385
6. When an offer is made by letter, an acceptance, by written reply, takes effect from the time when the communication containing the acceptance is sent, and not from the time it is received by the other party. *Levy vs. Cohen.* 5 Ga..... 1
7. In a promise, by A to B, to pay so much money, "so soon as he can collect it out of C, by law," the qualification has reference to time, and not to the solvency of C. *Woolbright vs. Sneed.* 4 Ga..... 167
8. In an action by B, on such a promise, it is necessary for him to prove that a reasonable length of time has elapsed, for the purpose of collecting the money, since the promise. *Ibid.*
9. The Statute of Limitations does not commence running against B, until after the lapse of such time. *Ibid.*
10. By deed, a *femme sole* conveys her estate, in contemplation of marriage, to trustees, to hold for her sole use, until the marriage; to the joint use of herself and her husband, during their joint lives; if she survives him, then to her and her heirs; and if he survived her, then to him and the children of the marriage, if any, jointly, during his life; if no children or issue, then to him for life; and there being issue or children of the marriage, to them and their heirs forever; and there being no children or issue, from and after the death of the husband, to her right heirs. The marriage was solemnized, and the wife died before the husband, leaving children, who died before the husband: *Held*, that a life estate was conveyed to the husband and children, with remainder in fee to the children; that the limitations created a vested remainder in the children, at her death; and that at the death of the husband, the property went to the heirs of the children, and not to the right heirs of the settler. *Holcombe vs. Tufts and another.* 7 Ga. 538
11. In a suit brought upon an instrument, in these words: "For value received, I promise to pay Gideon Hotchkiss, five hundred dollars, at Hopkins & Hardeman's foundry, at Augusta—said Hotchkiss' present account to go in part payment. The said castings to be taken at 6 cts. per lb." *Held*, that no time being fixed by the contract, for the delivery of the property, that there must be a demand and refusal proven. *Hotchkiss vs. Newton.* 10 Ga..... 560

IV. SUITS UPON CONTRACTS.

1. An action on a contract, whether express or implied, or whether by parol or under seal, or of record, must be brought in the name of the party in whom the *legal interest* in such contract is vested. *Caruthers, Adm'r, &c. vs. Wardlaw. Dudley*..... 189
2. An express contract of sale cannot be recovered on, under a general *indebitatus assumpsit* count; it must be specially declared upon. *Banks et al. vs. Carter et al. Dudley*..... 92
3. The charter of the Insurance Bank of Columbus, prescribes the mode in which contracts shall be executed, to be binding on the company, viz: that they shall be signed by the president and countersigned by the cashier. In a suit by the holder of a bill against the indorser, on a bill drawn by himself, as president of the said bank, in his own favor, he cannot object to the regularity of the contract, nor is he protected on his indorsement by its want of conformity to the Statute. *McDougald vs. The Central Bank. 3 Kelly*..... 191
4. Where the undertakings of the parties to a contract are concurrent, and one is ready and willing, and offers to perform, and the other is not; the first is discharged from performance, and may maintain an action against the other. *Biggers vs. Pace. 5 Ga*..... 171
5. A demand of goods sold at the time and place specified, is *prima facie* evidence of the readiness of the purchaser to pay for them. *Ibid.*
6. Where goods are to be delivered and money paid, the *actual* tender of the money will be dispensed with, by the repeated declarations of the seller, that he will not receive it. *Ibid.*
7. Notwithstanding the title may have passed from the seller to the buyer, yet, if the former will not surrender the goods, the latter may either being *trover* or else *case* for the damage, from failure to deliver. *Ibid.*
8. A exposed certain slaves at public auction, which were knocked off to B. B, failing to comply with the terms of sale, agreed in writing, that the negroes might be re-sold, at his loss and expense: *Held*, that to charge B, A would have to show that the second sale was consummated: *Held*, also, that B was liable for the difference in the two sales, notwithstanding A refused to let him have one of the negroes bid off by him, at the second sale, it appearing he was re-sold the same day, for the same price. *Hicks vs. Ayer. 5 Ga*..... 298

9. Where P, without authority of law, sold the land of N to P & H, after the death of N, and before administration on N's estate, and received a part of the purchase money therefor: *Held*, that the administrator of N could not maintain an action against P for money had and received to his use, nor for the use of the estate of N, for the reason that the legal representatives of N had not been deprived of any legal or equitable interest in the land, by such unauthorized sale, as would equitably entitle them to recover the purchase money therefor. *Crews, Ex'r, vs. Heard, Adm'r.* 7 Ga..... 60
10. Where P entered into a written contract with R, as an overseer for the year 1847, and was to receive a stipulated portion of the crop, at the end of the year, for his services, and in the month of August R dismissed him from his employment, without sufficient cause or provocation; whereupon P, in the month of November, of the same year, brought suit against R, to recover damages for a breach of the contract: *Held*, that the action was not *prematurely* brought, and that in regard to this particular class of special contracts, wherever the overseer or agent is *wrongfully* dismissed from the service of his employer, he has his election of three remedies: 1st. He may bring suit immediately for any special injury he may have sustained in consequence of the breach of the contract. 2d. He may wait until the end of the year, and then sue upon the contract and recover his whole wages. 3d. He may treat the contract as rescinded, and sue on a *quantum meruit* for the work and labor actually performed. *Rogers vs. Parham.* 8 Ga. 190
11. If the declaration alleges a special contract for the rent of mills, to be paid in repairs, and it is proven on the trial, the plaintiff cannot recover on a *quantum meruit*, but will be held to the special contract. *Baldwin vs. Lessuer.* 8 Ga..... 71

See *Action*, 1 to 12.

CONTRIBUTION.

1. Where a plaintiff, in an action *ex contractu*, recovers judgment against several defendants, and one of them pays the whole demand, the law gives him an action for money paid, against the others, for contribution. *Dent vs. King et al.* 1 Kelly. 202
2. Defendants standing *in equali jure* are bound to contribute. This doctrine does not apply to judgments against several, in actions for *tort*. *Ibid.*

8. A judgment is the highest evidence of the defendants' joint indebtedness, but not conclusive of the right of the one having paid it, to receive contribution. It is not conclusive that the defendants are in *equali jure*, but only *prima facie* evidence of that fact. *Ibid.*
4. Accommodation indorsers are not liable to contribution, as sureties, in Georgia. *Stiles vs. Eastman et al.* 1 *Kelly*..... 210
5. There is no contribution between purchasers *with warranty*, upon good consideration, in succession, at different times, of different parts of the estate of a mortgagor. *Cumming vs. Cumming et al.* 3 *Kelly*..... 481
6. In an action for contribution, the record of the entire proceedings, which is the basis of the suit, must be introduced, unless it appears from the testimony in the case, that the recovery was on contract. *Haupt vs. Adm'rs of Cope.* 4 *Ga.*..... 543
7. Where a decree is obtained against two administrators, for the waste committed by one, and that one subsequently pays off the execution issued thereon, he has no right to contribution from his co-administrator. *Ibid.*
8. Contribution to remove a general lien on the whole property, will not be allowed among *volunteers*, where there is another fund primarily liable. *Demere et al. vs. Scranton et al.* 8 *Ga.*..... 43
9. One legatee, who has received his legacy, and no more, cannot be called on to contribute to a co-legatee, the executor being solvent and admitting assets in his hands sufficient to pay the other legacy. *Ibid.*
10. A residuary legatee is not liable to refund to another legatee, unless there was an original deficiency of assets, and in cases where the payment of his legacy would amount to a *devastavit*. *Ibid.*

CONVERSION. See *Trover*.

CONVEYANCE. See *Assignment; Deed*.

CONVICTION AND SENTENCE. See *Criminal Law*.

CORONER.

1. A defaulting Juror, at an inquest, is subject to fine. *Ex parte McAnnully. T. U. P. Charl.*..... 310

CORPORATIONS.

I. CHARTERS: RIGHTS AND LIABILITIES.

II. RIGHTS AND LIABILITIES OF MEMBERS.

III. OFFICERS AND AGENTS; POWERS AND LIABILITIES.

IV. FORFEITURE OF CHARTERS AND DISSOLUTION OF CORPORATIONS.

I. CHARTERS: RIGHTS AND LIABILITIES.

1. A corporation cannot be garnisheed under the Statute of 1822, authorizing garnishments, in certain cases therein mentioned. *Rives vs. Boulware et al. Dudley*..... 153
2. The property of a foreign corporation within this State, is liable to be attached, under our Attachment Laws. *South Carolina R. R. Co. vs. McDonald. 5 Ga*..... 531
3. *Private* corporations cannot be deprived of their franchises, but by a judicial judgment upon a *quo warranto*—but public corporations, created for the purposes of City government, may be controlled, and their charters amended and altered by the legislative power. *State vs. Mayor, &c. Savannah. R. M. Charl*..... 250
See also, *Mayor, &c. vs. President, &c. R. M. Charl*..... 342
4. But the Legislature cannot divest a political corporation, without its consent, of the property legally acquired by it. *Mayor, &c. vs. President, &c. Steamboat Co. R. M. Charl*..... 342
5. Nor can such corporation alien or grant the public property, for purposes different from the object of its original appropriation. *Ibid.*
6. Upon a re-organization of a corporate body, which is essentially changed thereby, in order to transfer to the new, the particular powers of the old corporation, there must be an enabling clause, empowering the new corporation to act in the particular case, or a general clause, which might embrace the particular case. *Ibid.*
7. Where the legal title to the soil is in a corporation, (or the public,) it may maintain an action of ejectment, to recover the possession of a street. *Ibid.*
8. But it *seems* that where only the easement, and not the freehold, is in the public, the only remedy for the violation of the right, is by public prosecution. *Ibid.*

9. An incorporated academy is a private corporation, notwithstanding it may derive its support, in part, from the Government. *Cleveland vs. Stewart et al.* 3 *Kelly*..... 291
10. A corporation aggregate, may file an answer to a bill in Equity, under its corporate seal. Such answer, however, not verified by the oath of some of the corporators, or agents, acquainted with the facts, is not sufficient to authorize a dissolution of an injunction. *Hemphill et al. vs. Ruckersville Bank.* 3 *Kelly*..... 444
11. A corporation is an artificial being—invisible, intangible, and existing only in contemplation of law. Being the creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. *Frederick et al. vs. The City Council of Augusta.* 5 *Ga*..... 561
12. Where a person obtains a license to retail spirituous liquors, for 12 months, under the Act of 1809, the corporate authorities of a City Council, by a *subsequent* ordinance, cannot enforce an additional tax, for the right to retail, under the license. *Mayor, &c. Rome vs. Lumpkin et al.* 5 *Ga*..... 447
13. In case of actual necessity, to prevent the spreading of a fire, or any other great public calamity, the private property of an individual may be taken and used or destroyed, for the relief or protection of the many, without subjecting those who act by order of the constituted authorities, to personal liability. *Bishop and Parsons vs. The City of Macon.* 7 *Ga*..... 200
14. But where the private property of an individual, the whole or part of which might have been saved to the owner, is taken or destroyed for the benefit of the public, those for whose supposed benefit the sacrifice was made, ought, in equity and justice, and are bound, under the Constitution of the U. S. to make good the loss which the individual has sustained for the common benefit. *Ibid.*
15. Where the same extent of loss would have been sustained, as the necessary consequence of the fire or other public calamity, if the property had not been thus destroyed, it would seem, that in such case, the sufferer has no equitable claim to compensation. *Ibid.*
16. In the construction of Statutes, made in derogation of common right, and in favor of corporations or particular persons, care should be taken not to extend them beyond their express words or their clear import. *The Mayor, &c. vs. The Macon and Western R. R. Co.* 7 *Ga*... 221
17. Where a railroad company has, by their charter, the *exclusive* right to carry and transport persons, produce, merchandize and all other things, over their road from Atlanta to Macon: *Held*, that their char-

- ter did not confer the *right* to engage in the business of transporting produce through the City of Macon, across the Ocmulgee bridge, from their depot to another railroad depot, for the accommodation of their customers. *Ibid.*
18. The Act of 1828, which provided, that wagons and carriages loaded with cotton and corn, should pass the Ocmulgee bridge free of toll, is repealed, *pro tanto*, by the Act of 1847, which vested in the corporate authorities of the City of Macon, the right to regulate the tolls of said bridge—this latter Act repealing all laws and parts of laws militating against its provisions. *Ibid.*
19. In the construction of Statutes made in favor of corporations or particular persons, and in derogation of common right, care should be taken not to extend them beyond their direct terms or their clear import. *The Mayor, &c. vs. Hartridye.* 8 Ga..... 23
20. It is the amount of shares subscribed, and not the sums paid in, which constitutes the capital stock of a company. *Hightower vs. Thornton.* 8 Ga..... 486
21. The subscription for stock is a debt, which the corporation may call in, to satisfy the creditors. *Ibid.*
22. The right to have the unpaid stock drawn in, to extinguish outstanding debts, is as clear and strong *after* as *before* the dissolution of the corporation. *Ibid.*
23. A periodical madness seems to pervade every section of the country, in the business of banking; leading necessarily to over-issues and consequent depreciation. It is the duty of the Government to guard against this mischief; and the regulations provided by law, for this purpose, instead of being relaxed, should be rigidly enforced by the Courts. *Ibid.*
24. Creditors of an insolvent corporation, whose charter has been forfeited, and who have exhausted their legal remedies against it, may sue in Chancery, for the assets of that corporation, and have them applied in payment of their debts. *Hightower et al. vs. Mustian.* 3 Ga..... 506
25. An assignment of assets, by a bank, (insolvent at the time, and about making a general assignment, and against which proceedings are pending, to revoke its charter,) made to a creditor, cognizant of these things, and by collusion with him to defraud the other creditors: *Held*, to be void, and that the assets so assigned, is a trust fund, to be applied to the payment of the debts of the corporation. *Ibid.*
26. A bill, by the creditors of an insolvent corporation, alleging a fraud-

- ulent combination and collusion between the *assignee* and *debtor* of the institution, to injure and defeat the creditors, makes a proper case for the interposition of a Court of Equity. *Stocks et al. vs. Leonard et al.* 8 Ga..... 511
27. A charter authorizing a municipal corporation to tax real and personal estate, does not necessarily confer the right to tax income. *The Mayor, &c. vs. Hartridge.* 3 Ga..... 23
28. Where the State has never taxed income, the power to do so in a corporation, must appear by express words or unavoidable implication. *Ibid.*
29. Grants of exclusive privileges, to corporations, are to be strictly construed; and if the terms of the grant are ambiguous, the ambiguity must operate in favor of the public. *McLeod et al. vs. Burroughs.* 9 Ga..... 213
30. Where, by the charter incorporating the City of Rome, which gave power and authority to the Mayor and Council, to pass all by-laws and ordinances that should appear to them necessary and proper, for the security, welfare and interest of said City, or for preserving the peace, health, order and good government thereof, and also to authorize said Mayor and Council, to license persons to retail spirituous liquors within the said City: *Held*, that it was competent for said Mayor and Council to pass an ordinance to prohibit the retail of spirituous liquors, by those to whom license had been granted, within the City, after the hour of ten o'clock at night; such ordinance not essentially *impairing* the right to retail, under the license granted, but only *regulating* the exercise of it, for the benefit of the peace, order and good government of the City. *Erastus Morris vs. The City Council of Rome.* 10 Ga..... 532
- See *Augusta; Macon; Savannah; Constitutional Law, II. IV. VII.; Rail Roads and Plank Roads.*

II. RIGHTS AND LIABILITIES OF MEMBERS.

1. A sale of stock, by a portion of the stockholders, to the rest, is not such a sale, by the *corporation*, as will make the purchasers liable to the creditors of the company. *Berry et al. vs. Matthews et al.* 1 Kelly. 523
2. Where the charter of a bank renders the stockholders liable, after the transfer of stock, unless sixty days notice of the sale is given, in one of the public gazettes of the State, and provided the transfer is made six months before the failure of the corporation, all stockholders who have given notice, in terms of the Act, are exempt, unless the failure occurs with-

- in six months thereafter; all other stockholders are liable for the redemption of the bills, whether they have transferred or not. This liability is not *primary* or *total*, but *secondary* and *proportional*. *Lane vs. Morris*. 8 Ga..... 468
3. The notice of the sale, by the stockholder, need not specify the name of the purchaser. *Ibid*.
 4. A suspension and failure to pay specie, on demand, to bill-holders, generally, is sufficient to enable the bill-holder to sue. He need not prove a special demand in his case. *Ibid*.
 5. The right given the bill-holders, to go upon the stockholders, for the ultimate redemption of the bills, is independent of any claim upon the assets of the corporation; one which may be asserted directly in his own name, and which the assignee or receiver could not enforce, as it constitutes no part of the effects of the bank. *Ibid*.
 6. The individuals who compose a corporation, may, *by contract* or *in law*, incur liabilities, during its existence, which will survive the charter. *Hightower vs. Thornton*. 8 Ga..... 486
 7. Unpaid subscriptions to the capital stock of a corporation, are corporate property, which can be reached by the creditors, in a Court of Equity; and this right exists, entirely independent of any statutory provision. *Ibid*.
 8. A Court of Equity will provide a remedy to enable the creditors to appropriate this trust fund. *Ibid*.
 9. The doctrine of *Dr. Salmon's* case, (1 *Cas. in Ch.* 204,) questioned. *Ibid*.
 10. Legislative Acts, as well as decrees of Courts, of late years, evince a sounder and purer morality, with regard to the liability of moneyed corporations. *Ibid*.
 11. It is the amount of shares subscribed, and not the sums actually paid in, which constitutes the capital stock of a company. *Ibid*.
 12. The subscription for stock is a debt which the corporation may call in to satisfy the creditors. *Ibid*.
 13. The equity of the creditor is equally strong where the stockholder has contracted to pay (and failed to do so) his portion of the capital stock, as where it has been paid in, and afterwards withdrawn. *Ibid*.
 14. The right to have the unpaid stock drawn in, to extinguish outstand-

- ing debts, is as clear and strong *after* as *before* the dissolution of the corporation. *Ibid.*
15. In South Carolina, stockholders held liable beyond the amount of their capital stock, unless restricted by the charter. *Ibid.*
16. There is no distinction to be drawn between moneyed corporations and railroad and manufacturing companies. If any exists, it is *against* the *former*. *Ibid.*
17. The provision in this charter for the forfeiture of stock, is for the *benefit* of the corporation, to coerce punctuality in the payment of instalments, and in case of failure, to afford to the company a speedy method of converting the stock into cash, and was not intended as a privilege to the stockholder to abandon his subscription. *Ibid.*
18. The power to sell the stock of a delinquent stockholder, is a cumulative remedy, and does not impair the right to compel payment by action. *Ibid.*
19. This being a case of pure and direct and technical trust, not cognizable at law, is not subject to the provisions of the Statute of Limitations. *Ibid.*
20. The Legislature having recognized and ratified the appointment of an assignee, made by the stockholders before the forfeiture of their charter, the duty of calling in the unpaid stock, to discharge debts, devolves properly upon him. *Ibid.*
21. If he, fraudulently combining with the stockholders, neglects or refuses to do his duty, the proceeding may be maintained directly by the creditor, in his own name, against the stockholders, making the receiver a party defendant to the case. *Ibid.*
22. A bill is filed by the assignee of a bank against a number of the stockholders of another insolvent bank, to compel them to contribute rateably, under a clause in the charter, which makes them personally liable for the bills in circulation, and also to appropriate the amount of stock subscribed by them and unpaid, to the payment of the debt due by the latter institution to the former, as a trust fund in their hands, and is demurred to, upon the ground that the complainant has an adequate Common Law remedy : *Held*, that the demurrer is not well taken. *Robinson et al. vs. Carey, Assignee.* 8 Ga. 527
23. Such a bill is not demurrable, on the ground that the liability of the stockholders is several and not joint *Ibid.*

III. OFFICERS AND AGENTS: POWERS AND LIABILITIES.

1. The managers or directors of the affairs of a corporation cannot be considered as trustees, or prohibited as such, from the purchase of the trust property or stock belonging to the corporation. *Hartridge et al. vs. Rockwell et al. R. M. Charl.*..... 260
2. A promissory note given by an agent, will bind the corporation, provided he acts within the sphere of his power, or the act was subsequently ratified. *Butts vs. Outhbertson et al. 6 Ga.*..... 166
3. Persons acting publicly, as the officers of a corporation, will be presumed rightfully in office, and their official acts will be binding on the corporation, so far as third persons are concerned. *Hall et al. vs. Carey, Assignee. 5 Ga.*..... 239
4. The provision to be found in the various bank charters of this State, requiring all contracts whatever, to be signed by the president and countersigned by the cashier, in order to bind the company, does not apply to such dealings and transactions as are usually and necessarily performed by the cashier, or some other duly authorized agent. *Carey, Assignee, vs. McDougald. 7 Ga.*..... 84

IV. FORFEITURE OF CHARTER AND DISSOLUTION OF CORPORATION.

1. *Private* corporations cannot be deprived of their franchise but by a judicial judgment upon a *quo warranto*; but *public* corporations may be controlled and have their charters amended and altered by the legislative power. *State vs. Mayor, &c. R. M. Charl.*..... 250
2. If a corporation be dissolved or surrendered, the offices under it share its fate. *Ibid.*
3. Upon re-organization of a corporate body, which is essentially changed thereby, in order to transfer to the new, the particular powers of the old, there must be a general or special clause in the charter, embracing the case. *Mayor, &c. vs. President, &c. R. M. Charl.*.. 342
4. The Act of 1840, which provides for the appointment of a receiver of assets of banks, which had forfeited their charters, and the Acts amendatory thereof, are *remedial* in their character, and do not contravene the provision of the Constitution with reference to the obligation of contracts. *Hall et al. vs. Carey, Assignee. 5 Ga.*..... 239

5. Corporations may be dissolved for a breach of trust. *Young vs. Harisons*. 6 Ga..... 130
6. A public corporation, which exists only for public purposes, may be dissolved, modified, enlarged or restrained, at the will of the Legislature. *Ibid*.
7. A private corporation is a contract between the Government and the corporators, and the Legislature cannot repeal, impair or alter the rights and privileges conferred by the charter, against the consent and without the default of the corporation, judicially ascertained and declared, in a proceeding instituted by the Government directly for that purpose. *Ibid*.
8. A forfeiture for *non-user* or *mis-user*, must be by judgment of a Court of Law—the corporation being first called upon to answer. No advantage can be taken of any non-user or mis-user on the part of the corporation, by any defendant in any collateral action. *Ibid*.
9. At Common Law, upon the dissolution, the debts due to and from it are extinguished. *Hightower vs. Thornton*. 8 Ga..... 486
10. The Legislature have the right to appoint a receiver to take charge of the assets of a notoriously insolvent bank, that had ceased to exercise its franchise, without officers and without stockholders, and to clothe him with power to maintain suits, &c. *Carey, Assignee, vs. Giles, Receiver*. 9 Ga..... 253

See *Banks and Banking*.

COSTS.

I. IN CIVIL CASES.

II. IN CRIMINAL CASES.

I. IN CIVIL CASES.

1. An attorney who institutes a suit for a client living out of the State, or out of the County of the defendant's residence, is liable for all costs, in the event of the suit being dismissed or his client cast: or if he recover, and judgment be entered up, execution issued and returned

- nulla bona*, he is still liable for cost. *Carmichael vs. Pendleton and another. Dudley*..... 174
2. In an action for malicious prosecution, where the plaintiff recovered one dollar damage, the Court held him entitled to no more costs than damage. *Stapp vs. Parthon. Dudley*..... 176
3. Where a *certiorari* was granted and sustained against the commissioners of the road, and there was no allegation that they acted corruptly, or with design to oppress, they were held not to be individually liable for costs. *Nunnally vs. Road Commissioners. Dudley*..... 192
4. The officers of Court cannot issue execution for their costs, against an executor or administrator, who has obtained judgment against a defendant that proves to be insolvent. *Janes vs. Robinson. Dudley*.. 1
5. No private contract, nor extraordinary trouble, can authorize the Sheriff to receive other, or higher fees, than are prescribed by law. *Forbes vs. Morel. R. M. Charl*..... 23
6. At Common Law, costs can be awarded only against the unsuccessful party. *Blakeman and Luke vs. Hays. Ga. Decisions, part II.*.... 165
7. Where a Sheriff levied on slaves, by virtue of an attachment, and while in his possession, worked and hired them out for his own use and benefit, and a verdict of a Jury having been returned on an issue directed by the Court, finding that the labor of the slaves was worth the *per diem* allowance authorized by law for keeping them: *Held*, that the Sheriff was bound to account for the same, on a rule at the instance of the creditors. *Hicks vs. Moore et al. 2 Kelly*..... 243
8. In Equity, costs do not always follow the event of the cause; they rest upon the sound discretion of the Court, to be exercised upon a full view of all the merits and circumstances of the case. *Pearce & Co. vs. Chastain. 3 Kelly*..... 230
9. In actions of slander, where the damages assessed are less than forty shillings, the plaintiff can have no more costs than damages. *Harden vs. Lumpkin. 5 Ga*..... 452
10. Where a Sheriff has collected money on an execution, and fails to pay it over, the party injured by such failure, may have an attachment for contempt against such Sheriff; and if such attachment is procured at the instance of the plaintiff in *fi. fa.* for his own benefit, and to redress his individual wrong, it is a *civil* process; and such plaintiff in *fi. fa.* is liable to pay the costs of the Sheriff's imprisonment, and not the County. *The Justices, &c. vs. Bivins. 6 Ga.*.... 575

11. Where a Sheriff seized and sold the property of a defendant, for a larger amount than the sum due on the execution, and returned that the proceeds of the sale were taken for costs, without specifying what costs: *Held*, that the return was illegal, and that it should specify the particular items of cost. *Harrison vs. Thompson*. 9 Ga..... 310
12. In accordance with the practice which prevails in most of the circuits in this State, costs cannot be taxed against the losing party, for the attendance of witnesses who are summoned but not sworn. *Mason & Waldrip vs. Dean & Nash*. 10 Ga..... 443
13. Under the Act of 1767, which declares, that when in actions of slander, the damages assessed shall be less than 40 shillings, the plaintiff shall recover no more costs than damages: *Held*, that the value of 40 shillings, in dollars and cents, is to be determined according to the rate at which dollars were estimated, in shillings and pence, at the time when the Act was passed; that is, at the rate of 4 shillings and 8 pence; and that the sum prescribed by that Act is eight dollars and 57 cents and a fraction of a cent. *Thurmond vs. Horton*. 10 Ga..... 500
14. *Held*, that in actions of slander, when the verdict is for a sum less than forty shillings, it is not competent for the defendant to have judgment against the plaintiff, for his costs, incurred in defence of the action. *Ibid*.

II. IN CRIMINAL CASES.

1. Orders for the payment of costs, under the 4th section of the 14th division of the Penal Code, are entitled to be paid, according to their priority of dates. *Hackett vs. Jones*. 2 Kelly..... 283
2. Where a witness had been subpoenaed in a criminal cause, to attend Court, out of the County of his residence, in behalf of the defendant, who was acquitted on the trial: *Held*, that such witness had no legal authority to charge for his attendance and mileage, and collect the same on his subpoena, as an execution, against the defendant. *Howell vs. Blackwell*. 7 Ga..... 443
3. In a matter of complaint against the Savannah and Ogeechee Canal Company, that they were guilty of a nuisance, by obstructing the drainage of the low lands of the Springfield plantation, the City Council of Savannah determined that they were guilty of the nuisance, and that they be notified to remove it within a specified time, by constructing an additional culvert; and in default thereof, that the culvert be built by the City, and that the Company pay the cost of its construction: *Held*, that the resolution, as to costs, is not a judgment, by which the rights of the company are concluded, and that the City

Council had power to pass such a resolution. *The Mayor, &c. vs. The Sav. & Ogechee Canal Co.* 9 Ga..... 281

4. An officer arresting a criminal, is not authorized to charge "rail-road fare" in his bill of costs—he is only authorized to charge *mileage*; and if the officer conveys the prisoner upon the railroad, it is at his own responsibility. *Peters, alias Simpson vs. The State.* 9 Ga..... 109
5. Each County is bound, by law, to keep a good and sufficient jail, for the safe keeping of criminals, at *the charge of the County*; and if there is not such a jail, and a guard is necessary for their safe-keeping, the expenses of such guard must be paid by the County, and not by the defendants who may be guarded. *Ibid.*
6. When the defendant is convicted, and cash funds are in the hands of the arresting officer, belonging to defendant, judgment should be entered for costs, according to the Acts of 1820 and 1830, and the money applied to its satisfaction—the balance paid over to defendant. *Ibid.*

COUNTERFEITING. See *Criminal Law*.

COUNTIES AND COUNTY OFFICERS.

1. The Inferior Court, through the County Treasurer, may make such defences to an order granted by them, as any other party to such an instrument would be entitled to make. *Johnson vs. The State of Georgia.* 1 *Kelly*..... 274
2. After the Inferior Court has set up their defence to a claim against the County, and judgment has been rendered against them, it is not competent for the County Treasurer to resist the payment of the order of the Court on him, upon the same grounds. *Coleman, Treasurer, vs. Neal.* 8 Ga..... 560
3. After an order granted by the Inferior Court, on the County Treasurer, it is not in his power to defend himself, for causes existing prior to the granting of the order. *Ibid.*
4. The County Treasurer may defend, under the Inferior Court, and in privacy with them, but not against them. *Ibid.*
5. It is a condition precedent, before a County Treasurer can enter upon the duties of his office, that he should give bond and security, and not

- having done so, he does not legally hold the office. *Foster vs. The Justices, &c.* 9 Ga..... 185
6. Before the Inferior Court can issue execution against a County Treasurer, for a balance in his hands, ten days' notice is required by Statute, to be given him; and the order of the Court under which the *fi. fa.* is issued, must show that such notice has been given. *Ibid.*
7. If the order is passed, but not entered by the Clerk, it is competent for the Court to place it on the minutes, *nunc pro tunc.* *Ibid.*
8. It is not competent for a County Treasurer to resist the payment of a debt, directed by the proper authority, to be discharged out of the public funds, set apart, in his hands, for that purpose, upon the ground that he had been notified that the holder thereof was not the rightful owner of the property upon the valuation of which the certificate had issued. *The State ex rel. Strange vs. Bell.* 9 Ga..... 334
9. When the Legislature declares that the certificate of certain commissioners, certifying that a particular sum of money is due an individual, in consequence of the depreciation of his property, by the removal of a County site, shall become a debt against the County Treasurer of such County, no order of the Inferior Court is necessary to authorize the County Treasurer to pay it. *Bell, Treasurer, vs. The State ex rel. Strange.* 9 Ga..... 367
10. Where five commissioners were appointed by the Inferior Court of Marion County, to assess the depreciation of property in the Town of Tazewell, caused by the removal of the County site therefrom: *Held*, that *three* commissioners were competent to act and make the assessment. *Ibid.*
11. Where a special jurisdiction is conferred, by the Legislature, on commissioners, for the purpose of ascertaining certain facts, which they are required to certify, and they do so certify, their certificate is the evidence of their judgment, and is as conclusive as any other judgment, upon the particular question submitted to them—it appearing, upon the face of the certificate, that they acted within the jurisdiction conferred upon them by the Statute. *Ibid.*
12. In 1847, the Legislature passed an Act “to establish and make permanent the new County site” of Scriven County, “to provide for building a Court House,” &c. and “to appoint commissioners to carry the same into effect, and to provide for the payment of the necessary expenses.” By the 5th section, the Justices of the Inferior Court were required to levy an extra tax, to pay the expenses: *Held*, that the commissioners appointed, had such an interest as would authorize them to apply for a *mandamus*, to compel the Inferior Court to levy the tax. *Manor et al. vs. McCall et al.* 5 Ga..... 522

COURTS.

- I. SUPERIOR COURTS—JURISDICTION, &c.
- II. INFERIOR COURTS, “
- III. COURTS OF ORDINARY, “
- IV. CITY AND OTHER SPECIAL COURTS.
- V. JUSTICES’ COURTS.

I. SUPERIOR COURTS—JURISDICTION, &c.

1. By the 6th section of the Judiciary Act of 1799, the Superior Courts, as *Courts of Law*, have the power to establish lost papers, notes, &c. and when it is done, the copy may be sued on and recovered, in the same manner as the original, and that without resort to a Court of Equity. *Barney, Adm’r of Evans, vs. Doyle. Dudley*..... 201
2. The powers of the *Superior Courts* of Georgia, as Courts of Equity, are co-extensive with those of a Court of Chancery in England. *Bolton vs. Hournoz. R. M. Charl*..... 125
3. Where a new jurisdiction is created by Statute, proceeding according to the course of the Common Law, the Superior Court can cause its proceedings to be brought up, and correct its errors. But where such newly created jurisdiction is summary, and does not proceed according to the Common Law, the Superior Court will, on *certiorari*, confirm or quash its proceedings. *Commissioners of Pilotage vs. Lowe et al. R. M. Charl*..... 298
4. Where a new jurisdiction is created by Statute, without prescribing its form of proceeding, such jurisdiction may pursue its own forms and regulations, if not inconsistent with the laws of the land. *Ibid* 298
5. The question of jurisdiction must be tried in the Court where it arises. *Stiles, Complainant, vs. Knapp et al. Defendants. Ga. Decisions, part II*..... 36
6. It may be raised at any stage of the proceedings, if the defendant is not in *laches*. *Ibid*.
7. To oust the jurisdiction of Equity, a party’s remedy at Law must be adequate, complete and suitable. *Habersham & Son, Comp’ts, vs. Scriven et al. Def’ts. Georgia Decisions, part II*..... 46

8. A plea to the jurisdiction is a personal right, and available only by the defendant. *Briscoe vs. Brewer et al. Georgia Decisions, part II.* 105
9. A decision made by a Judge at Chambers, will be revised by the Supreme Court, upon writ of error. *Moore vs. Ferrell et al. 1 Kelly....* 6
10. A Court cannot originate a case, or a motion at Chambers, and give judgment thereon, unless the authority is expressly conferred by law. *Watson, Ex'r, vs. Jones. 1 Kelly.....* 303
11. But where a motion originates during a regular term, and contains a provision for the further action of the Court upon it, and for the rendering of its judgment in vacation, to be entered on the minutes of the Court, as of such term, such judgment, so rendered in vacation, is legal, and should be entered by the Clerk accordingly. *Ibid...303-4*
12. An execution owned by a person residing in one County, is levied upon land in another, and a claim interposed. The Superior Court of the County where the land lies, has jurisdiction over the plaintiffs residing out of that County, in Equity, in consequence of the pendency of the claim, in a proper case made. *Merchants' Bank vs. Davis. 3 Kelly.....* 115
13. Parties cannot, by consent, give jurisdiction to a Court, where it has none by law. *Bostwick, Adm'r, vs. Perkins, &c. 4 Ga.....* 47
14. The Superior Courts have, in Georgia, general Equity jurisdiction, in all cases where a Common Law remedy is not adequate: and have inherent jurisdiction, to carry into effect the charitable bequests of a testator, independent of the Statute of 43d Elizabeth. *Beall et al. vs. The Ex'rs of Fox. 4 Ga.....* 404
15. There is no Statute Law of Georgia, which authorizes citizens of a foreign State to be made parties to proceedings in our Courts, without their consent, and to conclude them in a judgment *in personam*. *Dear- ing vs. The Bank of Charleston. 5 Ga.....* 497
16. The Act of 5th Geo. II: *Held*, to be of force in Georgia in its spirit; that Act applies to citizens of the State, who abscond or depart from the State, to avoid the service of process; or citizens of a foreign State, who having been in the State, depart therefrom for the same purpose. *Ibid.*
17. The property of a citizen of a foreign State, within the limits of this State, is subject to the jurisdiction of our Courts. *Ibid.*
18. The jurisdiction of the Superior Courts of Georgia, is co-extensive with its sovereignty; yet they conclude, by their judgments, none but parties. *Ibid.*

19. The Courts of this State have no extra-territorial jurisdiction, and cannot make the citizens of foreign States amenable to their process, or conclude them by a judgment *in personam*, without their consent. A judgment *in personam* rendered against an inhabitant of a foreign State, although notice was served upon him by publication, under the 2d Rule in Equity: *Held*, to be a nullity as to him. *Ibid*.
20. In a suit in Chancery against a citizen of this State, who has been duly served, and also against an inhabitant of a foreign State, a decree rendered therein: *Held*, to be conclusive, as between the complainant and the citizen of this State, and that it is a complete protection to such citizen; and the decree on such a suit cannot be enjoined by such foreign citizen, on the simple fact of *non-residence*. *Ibid*.
21. A construction put upon the *second Rule in Equity*, authorizing service to be perfected by publication, in certain cases. *Ibid*.
22. A judgment obtained in a County where the defendant does not reside, by an acknowledgment of jurisdiction, is void as against subsequent judgments obtained in the manner and place prescribed by law. *The Ga. R. R. & Bk'g Co. vs. Harris et al.* 5 Ga..... 527
23. The Superior Courts of this State have the power to relieve a citizen against a grant which has been improvidently issued, upon a proper case made. *Lamb vs. Harris.* 8 Ga..... 546
24. The jurisdiction of the Courts of this State, is co-extensive with its sovereignty, and that is limited only by its territory, and it therefore attaches upon all the property and persons within the limits of the State; yet it is to be so exercised as to conclude by judgment, none but those who are parties. *Adams vs. Lamar.* 6 Ga..... 83
25. The Courts of this State have no extra-territorial jurisdiction, and cannot make the citizens of foreign States amenable to their processes, or conclude them by a judgment *in personam*, without their consent. *Ibid*.
26. A foreign citizen may waive his exemption and submit to the jurisdiction, and in that event he will be concluded by the judgment. *Ibid*.
27. When a foreign citizen appears, and, by counsel, pleads to the jurisdiction, he is not held to have waived his exemption by appearance. Appearance and pleading, or answering to the *merits*: *Held*, to be a waiver of his exemption, and an assent to the jurisdiction. *Ibid*.
28. A files his bill against B, who is a citizen of New York, setting forth an agreement, by which B stipulates to give to A, one-third of certain lands, to which B held the legal title, and prays an assignment of the

one-third, and a conveyance by B to A. Service of the bill was perfected on B's agent, in Georgia: *Held*, that upon this bill a Court of Chancery could not decree against B, because of the want of jurisdiction over him. *Ibid*.

II. INFERIOR COURTS.

1. The Inferior Court is not a corporation, and cannot be sued as such. *Forsyth vs. Justices Inferior Court. Dudley*..... 40
2. By the 2d section of the Act of 10th December, 1803, the Justices of the Inferior Court have power to discharge persons imprisoned for debt, under circumstances therein named; but they must do it as a Court. An order for discharge, submitted to them individually, for their respective signatures, out of Court, is insufficient and void. *Woodruff & Co. vs. Dean & Mahony. Dudley*..... 215
3. The Inferior Court, as established by the Constitution of Georgia, and distinguished from other inferior judicatories ordained and established by the General Assembly, has the power to grant new trials. *Ex parte Simpson. R. M. Charl.*..... 111
4. The constitutional writ of *certiorari* is applicable to the errors of inferior jurisdictions, contradistinguished from the "Inferior Court;" the judicial writ of *certiorari*, is alone applicable to the "Inferior Court," as before distinguished. *Ibid*.
5. The Justices of the Inferior Court are eligible to legislative and military appointments, in addition to their judicial duties; and if so elected, and the respective duties happen to be contemporaneous, may elect which to perform. *Presentments of Grand Jury. R. M. Charl.*..... 149
6. The Justices of the Inferior Court are not liable to the performance of militia duty. *State vs. Fort. R. M. Charl.*..... 272
7. The law organizing the Inferior Court, constitutes five Judges the Court. The concurrence of a majority of the whole number of Justices, is therefore necessary to the validity of their action. *Johnson vs. The State. 1 Kelly*..... 274
8. The Inferior Court has no power to rescind an order drawn by it on the County Treasurer. *Ibid*.
9. The Inferior Court may review and annul an order absolute, against a Sheriff, at a subsequent term, upon motion, when it is made to appear that he was not in contempt; and its action is subject to revision by

- the Superior Court, by writ of *certiorari*. *Chipman vs. Barron*. 2
Kelly..... 225
10. The Act of 1796, authorizing the Inferior Court to issue execution against depositaries of public moneys, without trial by Jury, is constitutional, so far as refers to money belonging to the public. *Tift et al. vs. Griffin*. 5 *Ga.*..... 185
11. But is unconstitutional, as to all others, than Collectors, Receivers or other legally appointed public agents. *Ibid.*
12. Where commissioners are appointed by an Act of the Legislature, to carry the same into effect, and the Justices of the Inferior Court of the County are required to levy an extra tax, to pay the expenses: *Held*, that the commissioners had such a legal interest, as would authorize them to apply for a *mandamus* against the Inferior Court, on their refusal to levy the tax. *Manor et al. vs. McCall et al.* 5 *Ga.*... 522
13. The Superior Court will not control the discretion of the Inferior Court, where it cannot be governed by some fixed principles, or rule, unless in the case of an arbitrary abuse of it. *Ibid.*
14. But where the law imposes a specific duty, a *mandamus* will be awarded, to compel the subordinate Court to perform that duty. *Ibid.*
15. Inferior Courts have no authority to grant new trials, in Georgia. *Booth & Ranes vs. Stamper*. 6 *Ga.*..... 172
16. The Inferior Courts, in this State, have jurisdiction, under the Act of 1847, to discharge defendants imprisoned on *mesne* or final process, for debt, (when the jail fees are not paid weekly,) on a writ of *habeas corpus*; and the judgment of such Court, whether erroneous or not, ordering the Sheriff to discharge a defendant imprisoned on final process, for debt, will be a protection to such officer. *Chamblee vs. Holcombe*. 7 *Ga.*..... 419
17. The right of the Inferior Court to sue in certain case, considered. *The Justices, &c. vs The Griffin Pl. R. Co.* 9 *Ga.*..... 475

III. COURTS OF ORDINARY.

1. A Court of Ordinary, in all applications for probate or administration, should conform to the practice of similar jurisdictions in England; at all events, to such an extent as to give the appellate jurisdiction a knowledge of the facts or doctrines, which formed the basis of the judgment of the inferior tribunal. *Tupper vs. Atwood. R. M. Charl.*..... 100

2. The Court of Ordinary will exercise a sound discretion, as to the kind of inventory of an executor of a deceased copartner, of the partnership effects of his testator, they will accept. *The Justices, &c. vs. McLaren.* 1 *Kelly*..... 291

3. The Court of Ordinary, having jurisdiction over the question, as to whether a guardian shall vest a portion of his ward's funds in the purchase of lands, to be cultivated by the slaves of the minor, its order, authorizing it to be done, will be presumed to have been granted, upon sufficient evidence, as to the expediency of the transaction, and cannot be invalidated in any other Court, unless impeached for fraud. *Stell, Guardian, &c. vs. Glass.* 1 *Kelly*..... 486

4. The Court of Ordinary cannot, upon the request of an executor, after his qualification, relieve him from the liability incurred by his trust. *In the matter of Mussault's Ex'r. T. U. P. Charl*..... 259

5. The Courts of Ordinary, in this State, are Courts of *limited* jurisdiction, and the facts necessary to give the Court jurisdiction of the particular subject matter, should affirmatively appear upon the face of its proceedings, when offered as evidence in any other Court. *Grier vs. McLendon.* 7 *Ga*..... 362

6. As, where the record of a judgment of the Court of Ordinary of Troup County, was offered in evidence to prove the appointment of a guardian of a ward residing in the State of Alabama: *Held*, that it should *affirmatively* appear on the face of the record and proceedings, that either the *person* of the ward was within the County, or that she had *property* within the limits of the County, so as to give the Court jurisdiction, and that the *want of jurisdiction*, either of the *person* or *property* of the ward, appearing on the face of the record offered in evidence, it was properly rejected. *Ibid.*

7. When it appears that the Court had jurisdiction of the particular subject matter, the judgment will be conclusive, when offered in any other Court, and cannot be attacked collaterally. In order to set aside such a judgment, some direct proceeding must be had for that purpose, in the Court in which the judgment was rendered. *Ibid.*

8. According to the provisions of the Act of 1819, the Justices of the Inferior Court in this State continue in office for the term of *four* years, and until their successors are elected and *qualified*: *Held*, that an election of Clerk of the Court of Ordinary, on the second Monday in January, 1849, by the old Justices, between the election and *qualification* of their successors in office, was a good and valid election. *Bonner vs. The State ex rel. Pitts.* 7 *Ga*..... 473

9. An order of the Court of Ordinary, directing the sale of the lands

of an estate, is a judgment of a Court of competent jurisdiction, and cannot be attacked and impeached, collaterally, by an heir claiming such lands. Hence, when property is claimed at administrator's sale, advertised and offered under such order, it is not competent for the claimant to prove that the estate was settled and the land divided without an administration, and that there were no debts to be paid. *McDade, Adm'r, vs. Burch, Adm'r.* 7 Ga..... 559

IV. CITY AND OTHER SPECIAL COURTS.

1. While the City Council of Augusta confines itself within the limits of the charter, to make police regulations under its own ordinances, it cannot be considered a Court subject to prohibition. *Mealing, et al. vs. The City Council of Augusta.* *Dudley*..... 221
2. In a City Court, whose jurisdiction is limited to a particular amount, a set-off which exceeds such amount cannot be pleaded. *Reed vs. Cormick.* *Dudley*..... 20
3. The 5th section of the Act of 1799, entitled an Act to regulate the pilotage of vessels to and from the several ports of this State, and which vests the Commissioners of Pilotage with power to decide, adjust and regulate any damage, dispute, complaint or difference, arising against or between master and pilot, for pilotage or any other matter relating to the business of a pilot, does not deprive the Justices' Court of jurisdiction over a demand for pilotage, where such demand does not exceed thirty dollars. *Taylor vs. Thomas.* *Dudley*..... 59
4. The City Council of Augusta have the power to establish and enforce such by-laws, rules and ordinances, respecting the harbor and wharves, and every regulation that shall appear to them requisite for the security, welfare and convenience of the City, provided they be not repugnant to the Constitution and laws of the land. *Dubois vs. The City Council of Augusta.* *Dudley*..... 31
5. Where a new jurisdiction is created by Statute, without prescribing its form of proceeding, such jurisdiction may pursue its own forms and regulations, if not inconsistent with the laws of the land. *Commissioners of Pilotage vs. Lowe et al.* *R. M. Charl.*..... 293
6. But notice to a defendant, is an implied and indispensable pre-requisite to the exercise of jurisdiction. *Ibid.*

V. JUSTICES' COURTS.

1. An entire contract cannot be divided, for the purpose of maintaining

- several suits and bringing them within the jurisdiction of a Magistrate.
Ex parte Gale. R. M. Charl...... 214
2. A Justice of the Peace has no jurisdiction of a case in which a plaintiff in attachment swears to a debt due by the defendant, exceeding thirty dollars. *Mahone vs. McDonald et al. Ga. Decisions, part I.*... 154
 3. When a garnishee answers in a Justices' Court, that he is indebted to the defendant in a sum exceeding thirty dollars, the Court cannot take jurisdiction of the case. *Ibid.*
 4. The Justices' Courts of Georgia are not Courts of record. *The Planters' and Mechanics' Bank of Columbus vs. Chipley et al. Georgia Decisions, part I.*..... 50
 5. Several suits cannot be commenced by the same plaintiff, against the same defendant, at the same time, in a Court not of record, on several causes of action, which in the aggregate exceed the jurisdiction of such Court. *Ibid.*
 6. Parties cannot divide a debt exceeding a Justices' jurisdiction, for the purpose of conferring jurisdiction; but they may sever them for the purpose of giving different days of payment, or for negotiation. *Ibid.*
 7. A debt originally exceeding thirty dollars, and reduced to that sum by actual payments, may be sued in a Justice's Court. *Ibid.*..... 50
 8. The copy of a note sued in a Justice's Court, need not be attached to the summons served on defendant. *Ibid.*..... 50
 9. When several cases are brought in a Justice's Court, upon notes given, as the consideration of the same contract, the Superior Court will not interfere, unless it were set up as a matter of defence. *Jack et al. vs. Watson, Justice, et al. Ga. Dec. part I.*..... 168
 10. If the defendant to actions in a Justice's Court, rely on a former recovery, he must plead it. *Ibid.*
 11. When several suits are brought in a Justice's Court, defendant can take advantage of their amounting to more than thirty dollars, only by a plea to the jurisdiction. *Gresham vs. Landers et al. Ga. Decisions, part II.*..... 149
 12. And the fact, that they originally constituted but one demand, must be proved. *Pinckard vs. Lucy Ware et al. Ga. Decisions, part II.*.... 172
- Also, *Kendall et al. vs. The Justices of 675th Dist. Muscogee County. Ga. Decisions, part II.*..... 185

13. The original notes are not evidence of this fact. *Ibid*..... 185
14. When a Justice's Court *fi. fa.* is lost, and its contents proven, and also a levy on land, by the Constable, and a return of the same to the Sheriff, the Court will presume that there was also on it the entry of "no personal property to be found." *The Lessee of Vaughn vs. Biggers.* 6 *Ga*..... 188
15. Where, on the trial of the right of property, in a Justice's Court, the same oath was administered to the Jury, as that of Special Jurors, in the Superior Court: *Held*, not to be error—the oaths being substantially the same. *Carter vs. Stansfield.* 8 *Ga*..... 49
16. The jurisdiction given to Justice's Courts, is to hear and determine suits, by *summons* or *warrant*, and a copy of the process is to be served by the Constable, personally, on the defendant, or left at his usual and notorious place of abode. *Fitzgerald vs. Adams and another.* 9 *Ga*... 471
17. It is the duty of the Constable to make an entry of service on the summons or warrant, in writing, and sign such return. *Ibid*.
18. Where a Constable, who did not write a good hand, requested a Justice of the Peace, *in his presence*, to make a return of "no property," on two *fi. fas.* he knowing the return to be true, of his own personal knowledge: *Held*, that the return was to be considered as the act of the Constable himself, and valid in law. *Ellis vs. Francis.* 9 *Ga*.... 325

COVENANT.

1. The action lies upon a deed executed by one partner, in the name of the partnership. *Straffin vs. Newell.* *T. U. P. Charl*..... 163
2. In an action of covenant, for breach of warranty, the plaintiff must aver, if not an eviction, at least, that he has abandoned, or has been deprived of the possession of the land; otherwise, the declaration is bad on demurrer, and a non-suit will be awarded. *McDowell vs. Hunter.* *Dudley* 4
3. In an action of covenant for a breach of warranty, in the sale of an unsound negro, the measure of damages is the difference between the price paid and the actual value of the negro, in her unsound condition; and if of no value, then the price paid, with interest thereon. *Broughton vs. Badgett.* 1 *Kelly*.....592-'3

4. The usual warranty of title in a deed, is such a covenant against incumbrances, as will be broken by a claim of dower. *Leary vs. Durham*. 4 Ga..... 592
5. Such a covenant runs with the land, and may be sued on by an assignee. *Ibid*.
6. A judgment in favor of the dowager, and confirming the return of the commissioners appointed to admeasure and lay off the dower, is sufficient proof of eviction. *Ibid*.
7. In an action, by the vendor, on a covenant made by the purchaser in the deed, the assignees of the purchaser cannot be joined with him as parties defendant. *Brooks vs. The Water Lot Company*. 7 Ga..... 101
8. A fraudulent combination between the covenantee and the plaintiff in ejectment, will preclude the idea of an eviction, upon title paramount. *Davies et al. vs. Smith et al.* 5 Ga..... 274
9. The eviction, to constitute a breach of the warranty of title, must be founded on a title paramount. *Ibid*.
10. The measure of damages, for the breach of a covenant of warranty of title, is the purchase money, with interest, from the time of the sale of the land. *Ibid*.
11. When land has been conveyed, with covenants of warranty, and the land has passed, by subsequent conveyances, through the hands of various covenantees, the last assignee, in whose possession the land was when the covenant was broken, has a right of action against any or all of the prior warrantors, whether immediate or remote, for breach of covenant. *Redwine vs. Brown et al.* 10 Ga..... 311
12. The covenants of seizure and of right to convey, and that the land is free from incumbrances, are personal covenants, not running with the land or passing to the assignee. The covenant of warranty, and the covenant for quiet enjoyment, are in the nature of real covenants, and run with the land conveyed, descend to heirs, and vest in the assignees of the purchaser. *Ibid*.
13. Does this distinction exist in this State, where all *choses in action* are assignable? *Query? Ibid*.
14. The fact that the covenant does not name the assignees, does not prevent them from suing. *Ibid*.
15. An assignee, notwithstanding he has taken a warranty from his immediate bargainors, upon eviction, has a right to sue the original or any intermediate grantor, upon his warranty. *Ibid*.

16. Upon a conveyance, without warranty, all deeds, warranties, covenants and other muniments of title, belong to the grantee, as appurtenant and incident to the land granted. *Ibid.*
17. Real covenants, or such as run with the land, may be assigned, as well by a release and quit claim, as by deed of bargain and sale. *Ibid.*
18. The assignee under a Sheriff's sale, is the assignee of the original party—as much so as if the latter had assigned to him directly. It is part of the debtor's "right, title and interest in the premises." *Ibid.*
19. So, too, of an official sale of real estate, made by an administrator, under a license from the Ordinary, "with all the rights, members and appurtenances thereto belonging, or in anywise appertaining;" the purchaser is put in the same situation that the intestate was in. *Ibid.*

CRIMINAL LAW.

- I. INDICTMENT AND PLEADING: JUDGMENT AND SENTENCE.
- II. EVIDENCE.
- III. PRACTICE.
- IV. PARTICULAR OFFENCES.
- V. GENERAL PRINCIPLES.

As to CONTINUANCES, see title "*Continuance.*"

I. INDICTMENT AND PLEADING: VERDICT, JUDGMENT AND SENTENCE.

1. A prisoner was indicted and convicted, under a law to which no penalty was annexed by the Legislature; on motion in arrest of judgment, the Court discharged him and arrested all further proceedings. *State vs. Ashley. Dudley*..... 188
2. If, on an indictment for burglary, the Jury find the prisoner "guilty of stealing from the dwelling house," the verdict will be set aside, and a new trial awarded. *State vs. Thompson. R. M. Charl*..... 80
3. An indictment must pursue the very words of the Statute upon which it is founded. *State vs. Calvin et al. R. M. Charl*..... 151
4. But it is sufficient, if the counts, taken collectively, pursue the words. *Ibid.*

5. The indictment charged, that the counterfeit bill was a note, purporting to be a note of the P. & M. Bank of South Carolina, which was the name given by the charter; the tenor of the note, as set forth, was, "The President, Directors & Co. of the P. & M. Bank of South Carolina." *Held*, that the addition of the words, "the President, Directors & Co." in the note, was a mere designation of the persons composing the corporation, who made themselves liable for the payment of the note, and that there was no variance or repugnance between the tenor and purport. *Ibid*.
6. In an indictment for forgery, it is not necessary to allege an intention to defraud, where the Statute upon which such indictment is founded, does not contain these terms; such intention is embraced in the words "falsely and fraudulently." *Ibid*.
7. To bring an offence under a Statute, one of these two courses must be adopted: to prefix the general conclusion "contrary to the form of the Statute in such case made and provided," or, to recite the tenor and substance of the Statute upon which the indictment was founded.
A vs. B. R. M. Charl...... 228
8. Where two distinct felonies are charged upon the prisoner, in one indictment, the Court may, before plea, quash the indictment, or after plea, compel the prosecutor to elect on which charge he will proceed.
State vs. Hogan. R. M. Charl...... 474
9. But this rule is to be exercised by the Court, in its discretion, and will be enforced, when the prisoner may be confounded in his defence, or prejudiced in his challenges, or where the attention of the Jury will be distracted by such joinder. *Ibid*.
10. And it does not apply, unless the charges are actually distinct, and grow out of different transactions. *Ibid*.
11. Where the indictment alleged, that the notes stolen were "notes of the Georgia Railroad and Banking Company," and the owner proved that he received them from such Banking Company: *Held*, in the absence of all proof to the contrary, that this was sufficient proof of their genuineness to support the allegation. *State vs. Allen. R. M. Charl.*..... 518
12. Under an indictment for murder, the Jury may find the prisoner guilty of the lesser offence of manslaughter, either voluntary or involuntary, and the verdict will be legal, although there is no count for manslaughter in the indictment. *Reynolds vs. The State. 1 Kelly.* 227-229
13. The Statute of Limitations does not run against an indictment found.

- for murder, though on the traverse, the prisoner is found guilty of manslaughter. *Ibid.*..... 227
14. Upon an indictment found for manslaughter only, the Statute would run from the death, and not from the time the mortal wound was given. *Ibid.*..... 228
15. An indictment founded upon presentment of a Grand Jury, need not be sent again before that body for its action thereon. *Nunn vs. The State.* 1 *Kelly*..... 245
16. It is the duty of the Clerk to spread out in full, upon the minutes of the Court, every presentment of the Grand Jury. *Ibid.*
17. An indictment accusing the defendant of a misdemeanor, specifying that such misdemeanor consists in keeping an open tippling house on the Sabbath day, contrary to the Statute, is sufficient. *Hall vs. The State.* 3 *Kelly*..... 21
18. An indictment which states the offence, in the terms and language of the Penal Code, or so plainly and distinctly, that the nature of the offence may be easily understood by the Jury, is sufficient. *Camp vs. The State.* 3 *Kelly*..... 418
19. The offence of an assault with intent to commit a rape, if stated in the language and terms of the Penal Code, defining the offence of rape, need not be called in the indictment, a misdemeanor. *Ibid.*.... 419
20. In an indictment under the 26th section, 11th division of the Penal Code, for bastardy, it is necessary to charge distinctly, that the defendant is the father of the bastard child. *Locke vs. The State.* 3 *Kelly*..... 538
21. The facts that the defendant is the father, and that he has failed or refused to give the bond, in pursuance of law, for the education and maintenance of the child, constitute the offence. *Ibid.*..... 539
22. An indictment for arson, charging the defendant with burning a house, used as a dwelling house, is sufficient. *McLane vs. The State.* 4 *Ga.* 335
23. An indictment, charging the defendant with publishing a certain libel, set out in full in the indictment, which was written by a third person, is sufficiently certain, without charging that the same was written by such third person. *Taylor vs. The State.* 4 *Ga.*..... 14
24. A libel "of and concerning the *character* of R. M. G." is the same as to allege it to have been published "of and concerning R. M. G." *Ibid.*

25. An indictment for bastardy is sufficient, which charges the defendant with being the father of the child, and that he refused to give bond, when required to do so, *in terms of the law*. *Walker vs. The State*. 5 Ga..... 491
26. Where the indictment charged the defendant with falsely and fraudulently uttering one piece of base and counterfeit money, made and counterfeited to the likeness and similitude of *legal* and *current* silver coin, called a dollar, knowing the same to be counterfeit: *Held*, that the indictment was sufficient, under the provisions of the Penal Code; more especially as there was *no objection* in the Court below, that it was not alleged *to whom* the defendant uttered the counterfeit coin. *Gentry vs. The State*. 6 Ga..... 503
27. In an indictment for a libel, placed in a situation where it might have been seen and read: *Held*, that it is unnecessary to aver or prove that it was seen or read. *Giles vs. The State*. 6 Ga..... 276
28. If a libel import defamation on its face, of a particular person, it is unnecessary to insert inuendoes in the indictment. *Ibid*.
29. It is not necessary, in the indictment, to charge the defendant to be a citizen of the County where the offence is alleged to have been committed. *Studstill vs. The State*. 7 Ga..... 2
30. The abbreviation *Thos.* for *Thomas*, in the name of the Foreman of the Grand Jury, indorsed on the back of the indictment, and written in full in the body of it, is no variance. *Ibid*.
31. All technical exceptions to indictments, which would be good at Common Law, are unavailing under the Penal Code, provided the offence is charged in the terms and language of the Code, or so plainly, that the nature of the offence charged may be easily understood by the Jury. *Ibid*.
32. Where it appeared from the minutes of the Court, on a particular day, that one of the Grand Jurors had been excused for the balance of the term, and also that a true bill had been returned on the same day by the Grand Jury against a defendant, in which the name of the excused Juror was inserted: *Held*, that the minutes of the Court did not afford even presumptive evidence, that the bill of indictment was found by the Grand Jury, after the excused Juror had left the body of his fellow Jurors, and was not sufficient to quash the bill of indictment. *Thompson vs. The State*. 9 Ga..... 210
33. The constitutionality of the Act of 1850, authorizing the trial of slaves before the Superior Court, sustained. *Anthony vs. The State*. 9 Ga..... 264

34. In prosecutions under that Act: *Held*, not to be necessary to aver the preliminary proceedings before the Magistrates, in the bill of indictment, nor to prove them on the trial. *Ibid*.
35. In prosecutions under this Act, for *murder*, and verdict for *manslaughter*: *Held*, that the Superior Court may pass sentence and inflict the punishment provided by law for manslaughter. *Ibid*.
36. It appearing from the statement in the face of the indictment, that the Grand Jury were sworn, it is not competent, on a motion in arrest, to disprove the recital by *aliunde* testimony. *Terrell vs. The State*.
9 Ga..... 58
37. In an indictment against a bank officer, for embezzling, the description of the bank bills, by amounts, value, by what bank issued, and by whom signed and countersigned, is sufficient, without specifying the numbers of the bills and the dates thereof. *Bulloch vs. The State*. 10 Ga..... 46
38. If some of the counts in the indictment be good, and others defective, and a general verdict of "guilty" be returned, the intendment of the law is, that the Jury find the charge in the good counts to be true, and judgment will be rendered by the Court thereon. *Ibid*.
39. Where there are several counts in the indictment, charging different grades of the same offence, with punishments differing in degree only, but of the same nature, and the Jury return a general verdict of "guilty," the judgment will not be arrested, but the Court will award judgment for the highest grade of the offence charged in the indictment. *Ibid*.
40. The principal offender and accessories after the fact, may be properly included in the same count in the indictment; and when so charged, in the manner prescribed by the Penal Code of this State, the charge against the principal, and the charge against the accessories, will not be considered as *separate and distinct* counts, but the accusation against all will be considered as embraced in one count; especially when each count commences and concludes in the manner and form required by the Code; and such conclusion, at the end of each count, against such principal and accessories, is sufficient. *Ibid*.
41. Where a defendant was indicted for simple larceny, in stealing a slave, and the evidence on the trial showed that, by his own confessions, he had made a promise to carry the slave North, he (the slave) consenting to be sold once or twice on the way: *Held*, that the Jury might, under the 45th section of the XIVth Division of the Penal Code, find the defendant guilty of the attempt to commit the offence, with-

out any special count in the indictment for that purpose. *Clifford vs. The State*. 10 Ga..... 422

42. In an indictment for larceny from the house, the accusation was in these words: "the said J B, feloniously entered the dwelling house of the said W M, in the night time, and having so entered, seven thousand dollars, to-wit: two thousand dollars, in gold and silver coin, of the value of two thousand dollars, and five thousand dollars in bank bills, of the value of five thousand dollars, the property of the said W M, in the said dwelling house, being then and there found, did privately and feloniously take and carry away, with intent to steal the same:" *Held*, that the description of the money was sufficiently particular, and that it was not necessary to allege or prove what portion of the coin were Washingtons or eagles, or Spanish milled dollars, or that the bank bills were of such a date, issued by a particular bank, and payable to some certain person. *Berry vs. The State*. 10 Ga... 54

II. EVIDENCE.

1. An accessory, jointly indicted with principal, in a felony, may be a witness for the State, but, it seems, not for the prisoner. *State vs. Calvin et al. R. M. Charl*..... 151
2. On an indictment, founded on a Statute for the forgery of a bank note, it is sufficient to prove it counterfeit, by proof of any imperfections. It is not indispensably necessary to disprove the hand-writing of the payee or president. One skilled in the matter, is competent to prove, by a comparison with a genuine bill, that the note, the subject-matter of the indictment, is a counterfeit. *Ibid*.
3. Presumptive evidence will be received, in proof of any fact involved in a criminal prosecution. *Ibid*.
4. If the evidence raises a violent presumption, that the offence for which the prisoner is indicted, was committed in the County where he is tried, it is sufficient. *Ibid*.
5. On an indictment for keeping a common gambling house, presumptive evidence that the defendant is the keeper of the house, is sufficient to convict. *State vs. Worth. R. M. Charl*..... 5
6. What a witness, who is since dead, testified in a former action, between the same parties, when the same point was in issue, may be proved in a second action, by one who heard him give evidence. *Jackson vs. Loud. R. M. Charl*..... 38
7. Where the charter of a bank required that certain acts should be per-

- formed, before it should be considered as incorporated, proof that its bills were received by the public officers of the State, granting the charter, in payment of public debts, and that such bills were in general circulation in said State: *Held*, sufficient evidence on an indictment for counterfeiting its bills, that the conditions had been complied with, and that the bank was an "incorporated bank." *State vs. Calvin et al. R. M. Charl.*..... 151
8. An accomplice, though included in the same indictment with his co-accomplices, is a competent witness for his associates, where they sever on the trial. *Jones vs. The State. 1 Kelly.*..... 617
9. When a negro, alleged to have been stolen, is charged, in the indictment, to be the property of the prosecutor, evidence that he was the purchaser of the negro, at Sheriff's sale, under the incumbrance of a mortgage, after condition broken, as the property of the prisoner, coupled with the lawful possession, was held to be sufficient to maintain the allegation. *Robinson vs. The State. 1 Kelly.*.....572-'3
10. When several defendants are included in the same indictment, and they elect to be tried separately, those not upon trial are competent witnesses for their accomplices, to prove their innocence. *Jones vs. The State. 1 Kelly.*.....616-'18
11. When the question is, whether a homicide is felonious or justifiable, the opinion of a witness, as to the intention of the deceased, in approaching the prisoner, is not evidence: *Aliter*, as to any information which the witness may have communicated, whether true or false. *Hudgins vs. The State. 2 Kelly.*..... 181
12. Parol evidence is inadmissible, to prove the cause of taking a recognizance. The offence must be specified in the recognizance itself. *Nicholson vs. The State. 2 Kelly.*..... 366
13. On an indictment for an assault, with intent to commit a rape, evidence that the person charged to have been injured, is, in fact, a common prostitute, or evidence of her reputation, that she is a woman of ill-fame, may be submitted to the Jury, to impeach her credibility and disprove her statement, that the attempt was forcible and against her consent. *Camp vs. The State. 2 Kelly.*..... 419
14. Interrogatories taken out under the Act of 1811, cannot be given in evidence, for the defendant, in a criminal case. *McLane vs. The State. 4 Ga.*..... 335
15. Proof of the passing, in payment, *base metal*, of the similitude of *gold coin*, will not support an indictment for passing in payment "counterfeit gold coin." *Rouse vs. The State. 4 Ga.*..... 130

16. An indictment, charging the defendant with passing counterfeit money to A, will not be supported by proof that it was passed to B, through A, as the agent of the prisoner. *Ibid.*
17. A bastardy warrant, reciting that the defendant has been charged, upon the examination of a single woman, with being the father of a bastard child, is admissible, in evidence, to *prove the arrest*, although it does not specify that he was brought before the Justice, to give security, &c. *Walker vs. The State. 5 Ga.*..... 491
18. Where an assailant intends to commit a trespass, to kill him, is manslaughter; but where a felony, the killing is self-defence. The character of the deceased, for violence, is admissible, to elucidate this question. *Monroe vs. The State. 5 Ga.*..... 85
19. Previous threats may be given in evidence, on a trial for an assault, with intent to murder, either as a justification, or to rebut the presumption of malice. *Howell vs. The State 5 Ga.*..... 48
20. When an Act is done, to which it is necessary to ascribe a motive, it is always considered, that what is said at the time, from which the motive may be collected, is a part of the *res gestæ*. *Monroe vs. The State. 5 Ga.*..... 85
21. In general, what a party says, is not evidence in his favor, unless it be a part of a conversation, some other part of which has been already given in evidence; but where the declarations of the party accompany the act, it becomes a part of the transaction, and is admissible. *Ibid.*
22. The declarations of a defendant, antecedent to the fact, are sometimes admissible, as tending to explain and reconcile his conduct, and to discover the *quo animo* with which the act was committed. *Ibid.*
23. Threats, accompanied with occasional acts of personal violence, are admissible, to justify the reasonableness of the defendant's fears, provided a knowledge of the threats is brought home to him. *Ibid.*
24. Repeated quarrels may be given in evidence, to establish the *malo animo*, but you cannot go back to a remote period, and prove a particular quarrel, unless it be followed up with proof of a continued difference, flowing from that source. *Ibid.*
25. The character of the deceased, for violence, may be given in evidence, to show the motive of the slayer, where there is doubt whether the act was done in self-preservation. *Ibid.*
26. As a general rule, all evidence should be admitted, which will go to

- show the state of feeling between the parties, at the time the offence was committed. *Ibid.*
27. If a libel appears in a man's handwriting, and no other author is known, it turns the proof upon him; and if he cannot produce the composer, he is presumed by law, to be the man. *Giles vs. The State.* 6 *Ga.*..... 276
28. The original indictment, with the verdict and judgment of conviction thereon, against the principal in the *first* degree, is admissible in evidence to prove *his* guilt, on the trial of the principal in the *second* degree. *Studstill vs. The State.* 7 *Ga.*..... 2
29. The record of the trial and conviction of the principal in the *first* degree, is *conclusive* evidence of the conviction, and *prima facie* evidence of *his* guilt, upon the trial of the principal in the *second* degree; and the *onus* lies on the defendant, to show that the principal in the *first* degree ought not to have been convicted. *Ibid.*
30. The confessions of the principal in the first degree, are admissible to prove *his* guilt, on the trial of the principal in the *second* degree, but not to prove the participation of the latter therein. *Ibid.*
31. It is not competent to prove that the defendant is of weak mind, where it is admitted that he is neither idiot, lunatic, nor insane. *Ibid.*
32. On the trial of the defendant indicted for murder, it is competent to give in evidence all that was done by the defendant *at the time of the killing*, and which constitutes a part of the entire transaction. *Reese vs. The State.* 7 *Ga.*..... 273
33. On the trial of a slave in this State, for a *capital* offence, the warrant and preliminary proceedings had before the committing Magistrates, alleged in the indictment, ought to be given in evidence on the trial, so as to show that the Inferior Court properly had jurisdiction of the offence with which the slave is charged. *Judge, a slave, vs. The State.* 3 *Ga.*..... 173
34. Where the evidence shows a concert of action between two parties in relation to a homicide, the Court may, in its discretion, admit the acts and declarations of one accomplice to criminate the other, touching the common object, and such discretion will not be controlled by the Supreme Court, except in case of manifest abuse. *Malone, alias Hall, vs. The State.* 8 *Ga.*..... 408
35. On a trial of slaves or free persons of color under the Act of 1850: *Held*, that it was illegal to admit in evidence the opinion of the com-

- mitting Magistrates, that the person charged was guilty of a capital offence. *Allen, a slave, vs. The State.* 9 Ga. 492
36. Where the prisoner is put upon his trial, a Jury impaneled and sworn for the purpose of trying him, and then a *nolle prosequi* is entered without his consent, the plea of *Autrefois Acquit* will bar any subsequent indictment for the same offence. *Reynolds vs. The State.* 3 Kelly. 56
37. In an indictment against a free white person, under the Act of 1840, for being accessory after the fact, in the receipt of stolen goods from a slave: *Held*, that in order to convict the defendant, the State must prove that the slave stole the goods. *Simmons vs. The State.* 4 Ga. 465
38. A libel should not be read to the Jury, until the defendant has cross-examined the witnesses proving its publication. *Taylor vs. The State.* 4 Ga. 14
39. On the trial of an indictment against a bank officer for embezzling a large sum of money from the bank, evidence going to show that he was in straightened circumstances, and was dealing to a large amount, shortly before the larceny, in the purchase of lottery tickets, thereby creating the necessity upon him for the use of large sums of money, is admissible for the consideration of the Jury: especially when corroborated by confessions of the prisoner himself, of large losses in the lotteries, about the time of the larceny. *Bulloch vs. The State.* 10 Ga. 46
40. On the trial of an indictment against a free white citizen, the State may give in evidence the confessions of a negro, when extorted by the pain of punishment, provided they are proved by a white person, not as independent testimony, but as an inducement and in illustration of what was said and done by the accused, he being present, consenting that the negro should tell all he knew. *Berry vs. The State.* 10 Ga. 511

III. PRACTICE.

1. Where an indictment is about to be presented against a Justice of the Peace, for mal-practice, the Court will hear a motion for a continuance, until the witnesses of the defendant may be present. *The State vs. Pettibone.* T. U. P. Charl. 300
2. The right of a prisoner, under the laws of Georgia, to have a copy of the indictment, and a list of the witnesses who gave testimony before the Grand Jury, is waived, by not making the demand before arraignment. *State vs. Calvin et al.* R. M. Charl. 142

3. The Court, on motion of the Solicitor General, and upon reasonable notice to the prisoner, (charged with felony, or with a crime which might subject him to penitentiary imprisonment for three years) will permit the names of witnesses to be indorsed on the indictment, who did not give testimony before the Grand Jury, and such witnesses may be examined before the Petit Jury. *Ibid.*

4. But without such notice, such witness cannot be sworn or examined. *Ibid.*

5. Where principal and accessory in a felony are jointly indicted, it is a matter of discretion with the Solicitor General, whether they shall be jointly or severally tried, particularly when they have joined in the general issue. *Ibid.*

6. The Court will not compel the prosecutor to elect, upon an indictment charging the prisoner with larceny, and receiving stolen goods, &c. where it appears by the indictment, that the charges relate to the same transaction, modified to meet the proof. *State vs. Hogan. R. M. Charl.*..... 474

7. It seems that if an existing indictment be altered by the prosecuting officer, and submitted, thus changed, to the Grand Jury, who again return "true bill," thereon, such informality will not destroy the second indictment, even though *nol. pros.* be subsequently entered on the minutes, in reference to the first indictment. *State vs. Allen. R. M. Charl.*..... 518

8. Where one of three defendants, jointly indicted, elects to be tried separately, under the provisions of the Penal Code, the trial, as to him, is to be considered in the same manner as if he had been separately indicted for the offence. *Jones vs. The State. 1 Kelly*.....616-18

9. When defendants, jointly indicted, elect to be tried separately, it is the privilege of the prosecuting officer, who asserts the affirmation as to their guilt, to determine which of them he will first put on trial. *Ibid.*

10. Under the 19th section of the 14th division of the Penal Code, no entry of *nolle prosequi*, shall be made after a case has been submitted to the Jury, except by the consent of the defendant. A case is submitted when the prisoner has been arraigned, the plea of not guilty filed and the Jury impaneled and sworn. *Newsom vs. The State. 2 Kelly.* 60

11. Before a Jury is impaneled in a criminal case, a *nolle prosequi* may be entered at the pleasure of the prosecuting officer; but when once the accused is put on his trial, and a Jury sworn for that purpose, it is the right of the defendant to have them pass upon his case; and if,

- after thus submitted, a *nolle prosequi* shall be entered on the bill of indictment, without the consent of the prisoner, it amounts to an acquittal. *Reynolds vs. The State.* 3 *Kelly*..... 56
12. As a matter of practice, the libel should not be read to the Jury, until the defendant has cross-examined the witness proving its publication. *Taylor vs. The State.* 4 *Ga*..... 14
13. The owner or manager of a slave, charged with a capital offence, when acting as the counsel of his slave on the trial, can lawfully waive the number of Jurors required by the Statute to be impanelled for the trial of such slave, and consent to take the first twelve on the Jury list. *Alfred vs. The State.* 6 *Ga*..... 483
14. On the trial of a slave, charged with a capital offence, and a verdict of guilty, the Court will not interfere to grant a new trial on the ground that the evidence was not sufficient to authorize a verdict, where there is *some* evidence for the consideration of the Jury, and no error in law apparent on the face of the record. *Ibid.*
15. Under the 18th section, 14th division of the Penal Code, a defendant is entitled to make his demand for trial at the first, second or any subsequent term of the Court. *Denny vs. The State.* 6 *Ga*..... 491
16. Where, upon demand made, the Court passes an order that the defendant be tried at the next term, or discharged, the legal inference is, that the Court did its duty, and that there was at that time a Jury impaneled and qualified to try the cause. *Ibid.*
17. Where, under a demand, a defendant is finally discharged, the better practice is, that the order of discharge recite, that at that term there was a Jury impaneled and qualified to try the cause. *Ibid.*
18. Where defendants, indicted jointly, sever on their trial, it is the privilege of the State's counsel to elect which shall be tried first; and where issue is joined upon a plea of *Autrefois Acquit*, by one defendant, before he announces himself ready for trial on the merits, and that issue is disposed of, this does not amount to an election by the State, and the other defendant may be placed first on his trial. *Studstill vs. The State.* 7 *Ga*..... 2
19. The absence of a witness, the object of whose testimony is to impeach another witness, expected to be introduced by the State, is good ground for a continuance; but if the witness, on the part of the State is not introduced, the Court will not grant a new trial, notwithstanding the motion for a continuance was refused. *Ibid.*
20. Where a defendant, who is indicted for murder, made a motion to

continue his cause, on the ground of the absence of two material witnesses, who had been subpoenaed, it is no error for the Court to postpone the trial, and compel the attendance of the witnesses, by the process of the Court. *Reese vs. The State.* 7 Ga..... 373

21. Where a defendant, indicted for murder, moves the Court to continue his cause, on the ground that there was great excitement and prejudice against him, in the public mind, so that he could not have a fair trial, and, to support his own affidavit, introduced two witnesses, who contradicted defendant's statements as to such public excitement: *Held*, that it was no error in the Court to refuse a continuance. *Ibid.*
22. Upon the trial of a slave, for a capital offence, when the evidence on the prosecution has closed, and the cause submitted to the Jury, on both sides, further evidence cannot be admitted, on behalf of the prosecution, against the defendant. *Judge, a slave, vs. The State.* 8 Ga... 173
23. There is no restraint on the power of the State Attorney, to enter a "*nolle prosequi*," on any bill of indictment, with the concurrence of the Court, provided the case has not been submitted to the Jury. *Durham vs. The State.* 9 Ga..... 306
24. The 18th section of the 14th division of the Penal Code, allowing any person, against whom a true bill of indictment is found, for an offence not affecting life, to place on the minutes of the Court a demand for trial, and entitling the accused to be absolutely discharged and acquitted of the offence, if such person is not tried at the term at which the demand is made, or at the next succeeding term thereafter, is imperative in its language, and admits of no exception; trial or acquittal, are the only alternatives. *Ibid.*
25. Where the offence has been recently committed, and the party accused imprisoned during the whole time which intervened between his arrest and trial, it is good cause of continuance, in a capital case, at the first term after the bill is found, that the defendant cannot come safely to trial, on account of the excitement in the public mind against him; and the affidavit of the prisoner, when made and filed in terms of the law, cannot be contradicted or traversed, either by a cross-examination or *aliunde* proof. *Bishop vs. The State.* 9 Ga..... 121
26. A defendant in a criminal cause, at the 2d term, moves to continue, on the ground that a material witness was absent, who had been subpoenaed and recognized to appear, and his expenses tendered to him, and that he expected to prove by him, that one of the witnesses expected to be introduced, and relied on by the State, said "that if hard swearing would send defendant to the penitentiary, he should go." *Held*, that the showing was sufficient. *Fox vs. The State.* 9 Ga.... 373

27. It is not competent for the Court to refuse a continuance, after a legal showing has been made, upon the ground of the Court's private knowledge of the good character of the witness, sought to be impeached by the testimony of the absent witness, and the Court's want of confidence in the integrity of the party moving the continuance. *Ibid.*
28. It is the duty of the Court to keep the Jury together, in a criminal case, from the time it is submitted to them, until they are finally discharged from its consideration. *Berry vs. The State.* 10 Ga..... 511
29. Should the counsel, on both sides, unite in petitioning the Court to permit the Jury to disperse, there would, perhaps, be no impropriety in granting the application, at any rate, in the trial of petty offences; still, it is a discretion which should be very cautiously exercised, under any circumstances. *Ibid.*

IV. PARTICULAR OFFENCES.

1. The Act 9th George I. commonly called the "Black Act," is not in force, in Georgia. *The State vs. Campbell.* T. U. P. Charl..... 166
2. On indictment for swindling, the proof was, the defendant had, by false representations, induced the prosecutor to purchase and pay for a tract of land, which defendant had already sold and conveyed to another; on motion, to enter *nol. pros.* for defect of proof, prosecutor not having tested his title by action of ejectment, the Court overruled the motion. *State vs. Doozier.* Dudley..... 155
3. And indictment for burglary, will not authorize a verdict of "larceny, by privately stealing in the house." The offences, under the Penal Code of Georgia, are distinct, in all their properties. Burglary must be committed in a dwelling-house, and "larceny from the house," in a house "other than the dwelling-house." *State vs. Maloney.* R. M. Charl 84
4. The 49th section of the 6th division of the Penal Code of Georgia, prescribes the punishment to be inflicted on a person who shall falsely and fraudulently make, sign or print, &c. any counterfeit note or bill of a bank, &c. The 52d section declares, that if any person shall falsely and fraudulently pass, pay, &c. any false, forged, counterfeit or altered note, as aforesaid, &c.: *Held*, that the latter section must be taken in connection with the former; that the term counterfeit was sufficient, without the addition of the words, "in imitation of" "or purporting to be," and that there was no repugnancy or inconsistency in these sections. *State vs. Calvin et al.* R. M. Charl..... 151

5. The Penal Code of Georgia prescribes the punishment for counterfeiting, &c. the note of any incorporated bank, "whose notes are in circulation in this State." Is the word *are* to be construed as relating only to banks whose bills were in circulation in this State at the time of the passage of the Act? *Quere? Ibid.*
6. Perjury is felony, under the criminal laws of Georgia. *Ibid*
7. Perjury, at Common Law, is abrogated, in Georgia. *Ibid.*
8. Evidence must be given, on an indictment for larceny, that the thing stolen is of some value. *State vs. Allen. R. M. Charl.....* 518
9. But it is not necessary that the subject-matter of the larceny should be of value to third persons, if valuable to the owner. *Ibid.*
10. The facts, that the defendant is the father, and that he has failed or refused to give the bond, in pursuance of law, for the education and maintenance of the child, constitute the offence of bastardy. *Locke vs. The State. 3 Kelly.....* 539
11. Indictment for assault, with intent to commit a rape, need not denominate the offence a misdemeanor. *Camp vs. The State. 3 Kelly.....* 419
12. When an indictment accuses the defendant of a misdemeanor, and then specifies that such misdemeanor consists in keeping an open tippling house on the Sabbath day, contrary to the Statute, the accusation of the offence in the indictment is sufficient, under the provisions of the Penal Code. *Hall vs. The State. 3 Kelly.....* 21
13. When the Statute declares, "any person who shall be guilty of keeping open tippling houses on the Sabbath day," the keeping open a tippling house, on the Sabbath day, is a violation of the Statute. *Ibid.*
14. The keeping open a tippling house on the Sabbath day is indictable and punishable, without proof that the defendant sold liquor, or that the same was a nuisance, or hurtful to the neighborhood, or to the religion and morals thereof; the offence consists in keeping open the doors of the *tippling shop* on the Sabbath day. *Ibid.*
15. Under the Constitution of the U. S. have the State Legislatures any authority over offences relative to the counterfeiting of the current coin of the U. S.? Query. *Rouse vs. The State. 4 Ga.....* 136
16. An indictment charging a libel to have been published, "of and concerning *the character* of R. M. G." is equivalent to an allegation that it was "of and concerning R. M. G." *Taylor vs. The State. 4 Ga..* 14

17. An indictment is not good, which charges an offence on its face, barred by the Statute of Limitations, without alleging one of the exceptions to the Statute, to prevent its operation. *McLane vs. The State. 4 Ga.*..... 335
18. An indictment charging the defendant with publishing a certain *libel*, set out in full in the indictment, *which was written by a third person*, is sufficiently certain, without charging that the same was written by such third person. *Taylor vs. The State. 4 Ga.*..... 14
19. The question of malice in the publication, is a question for the Jury. *Ibid.*
20. As to how far a publication may be justified in protection of legal rights, see *Opinion of Judge Fleming. Ibid.*
21. Where an assailant intends to commit a trespass, to kill him is *manslaughter*; but where a felony, the killing is in *self-defence*. The character of the deceased for violence is admissible, to elucidate this question. *Monroe vs. The State. 5 Ga.*..... 85
22. Such crimes as, by the Common Law, are followed by judgment of forfeiture of lands or goods, or both, are felonies in England. *Adams vs. Barrett. 5 Ga.*..... 404
23. *Mayhem* was not felony by the Common Law, except by castration. *Ibid.*
24. In an indictment for a *libel*, placed in a situation where it might have been seen and read: *Held*, that it is unnecessary to aver or prove that it was seen or read. *Giles vs. The State. 6 Ga.*..... 276
25. If a *libel* import defamation on its face, of a particular person, it is unnecessary to insert *inuendoes* in the indictment. *Ibid.*
26. It is libellous to charge a person with being a drunkard, a cuckold, and a tory. *Ibid.*
27. A person who appears to have written a *libel*, which is afterwards published, will be considered as the maker of it, unless he show another to be the author of it, or prove the act to be innocent of itself. *Ibid.*
28. If a *libel* appears in a man's handwriting, and no other author is known, it turns the proof upon him; and if he cannot produce the composer, he is presumed by law to be the man. *Ibid.*
29. The Act of 1847, to prevent white persons from gambling with negroes and free persons of color, creates the offence in three different

forms: 1st. Playing *and* betting by those engaged in the game. 2d. Playing *without* betting by those engaged, but with the purpose that others may bet. 3d. Betting on a game played by others. *Johnson vs. The State*. 8 Ga..... 453

30. Playing, *per se*, is not an offence under that Act. *Ibid*.

31. Query. Whether proof of playing alone will create a presumption of guilt, so as to put the accused upon proof that the playing was without betting, and without a purpose or intention that others might bet? *Ibid*.

32. In an indictment for larceny from the house, it is not necessary to allege that the accused entered with an intent to steal; the crime may be consummated where the original entry was not felonious. *Berry vs. The State*. 10 Ga..... 511

33. Proof that a trunk was taken and carried away from the house, in which there was money, is sufficient to sustain a charge of taking and carrying away money, especially when all the facts show the *quo animo* with which the trunk was taken. *Ibid*.

See *Specific Offences*, under their appropriate heads.

V. GENERAL PRINCIPLES.

1. In this country, no person can be injured in his personal property, without an opportunity of defending himself; consequently, an order of a City Council imposing penalties upon a citizen for keeping a faro-table, without his being heard, is illegal and void. *The State vs. The Corporation of Savannah*. T. U. P. Charl..... 235

2. It seems that the Penal Code of Georgia does not abrogate all the Criminal Law of England, in force anterior to its passage, but leaves it as it was, with a restriction only, as to any punishment which may be incompatible with the nature and purposes of a penitentiary system. *State vs. Malony*. R. M. Charl..... 84

3. A person charged with a felony in another State, and fleeing to this, may, upon a principle of comity between sovereign States, be detained for a reasonable period, for the purpose of affording an opportunity to the proper authority, to demand the prisoner. *State vs. Howell*. R. M. Charl..... 120

4. Where a felony of a high grade was charged upon a prisoner, it rests in the sound discretion of the Court, whether he shall be admitted to bail; and where, on such a charge, the affidavits against him

- are very positive, and there are no extrinsic circumstances in his favor, bail will be refused. *Ibid.*
5. Where it appears upon a charge of homicide, that there are favorable circumstances in the case, and there is a presumption that the prisoner has been guilty of manslaughter only, the Court will exercise its discretion by admitting bail. *State vs. Wicks. R. M. Charl.*..... 139
 6. Penal Statutes cannot have a retrospective operation. *Spencer vs. Negroes Amy and Thomas. R. M. Charl.*..... 178
 7. Felony in Georgia, is the commission of a crime, which subjects to penitentiary punishment. *A vs. B. R. M. Charl.*..... 223
 8. Forfeiture of lands or goods, is not, in Georgia, a component part of the punishment of felony. *Ibid.*
 9. The Judges of the Superior Court in Georgia, have a discretionary power, (governed by the circumstances of the case) to bail in all cases whatsoever. *State vs. Abbott. R. M. Charl.*..... 244
 10. It is not a sufficient ground for bail, that the verdict of the Coroner's Jury does not charge the prisoner with felonious homicide, if the affidavits and depositions taken by the Coroner and the committing Magistrate, taken in connection with the verdict, show that a felony has been committed, or is charged. *Ibid.*
 11. And where, on such charge, it appears that the prisoner has confessed that the death was caused by him, he will not be bailed, unless there be the existence of some special cause to induce it. *Ibid.*
 12. Though the prisoner on his trial, is entitled to have the whole of his confession given in evidence, if any part is offered; yet, on application for bail, the exculpatory circumstances stated by him in such confession, will not be sufficient to sustain the application, unless supported by other testimony, or strong intrinsic presumptions of their truth. *Ibid.*
 13. A person charged with felony, cannot make the omission of a public officer to prosecute at the succeeding term, a ground for bail, unless such omission has operated, or may operate oppressively. *Ibid.*
 14. The words "*ex post facto* laws," are to be applied exclusively to criminal laws. *Forsyth vs. Marbury. R. M. Charl.*..... 324
 15. The confinement of an insolvent debtor, convicted of fraudulent practices, under the Insolvent Laws of Georgia, is merely a continua-

- tion of the confinement under civil process; it is not a punishment inflicted for a crime. *State vs. Simpson. R. M. Charl.*..... 122
16. After conviction, the prisoner moved for a new trial, producing the affidavit of prosecutor, that he had sworn falsely on the trial, and that prisoner never stabbed him. But it appearing to the Court, that the prosecutor had been drinking liquor, and that his mind was clouded thereby, at the time such affidavit was administered; that the contents of such affidavit were not read to him by the Magistrate, and that he was sworn thereto, upon his saying that he knew the contents—that said affidavit was made by prosecutor with the intention of immediately leaving the State—that there was strong ground to believe that he was tampered with, and the identity not being clearly proved, and his testimony given on the trial, having been confirmed by two disinterested witnesses—the motion was refused. *State vs. Henley. R. M. Charl.*..... 505
17. A fine, remitted by an Executive pardon, being in the hands of the Attorney General or other officer of Court, unappropriated in the manner prescribed by law, will be refunded, under an order of the Court, by rule, against such officer. *In the matter of the Attorney General. 1 Kelly.*.....607-10
18. The condition of a recognizance, or bond to appear and answer to a criminal charge, at a given term of the Court, is not fulfilled by the principal being present at that term; the condition of such a bond is not fulfilled by appearing and answering to the charge, by pleading to it, but the accused must be and appear at the first term, and continue to appear, until he is permitted to go, by leave of the Court had, or until he is acquitted or otherwise legally discharged; or if convicted, until sentence is passed, in order to the fulfilment of the obligation of the bond, and the release of the securities. *Alexander et al. vs. The State. 2 Kelly.*..... 188
19. If a man has reason, sufficient to distinguish between right and wrong, in relation to a particular act about to be committed, he is criminally responsible. An exception to this rule, however, is, where a man has reason sufficient to distinguish between right and wrong, as to a particular act about to be committed, yet, in consequence of some delusion, the will is overmastered, and there is no criminal intent, provided the act itself is connected with the peculiar delusion under which the prisoner is laboring. *Roberts vs. The State. 3 Kelly.*..... 326
20. The question of malice, in the publication of a libel, is a question for the Jury. *Taylor vs. The State. 4 Ga.*..... 14
21. In Georgia, the person injured is not bound to prosecute the offender to conviction or acquittal, before he is entitled to bring an action

- for the civil injury, except in treason and felony, by the Common Law. *Adams vs. Barrett.* 5 Ga..... 404
22. Such crimes as, by the Common Law, are followed by judgment of forfeiture of lands or goods, or both, are felonies in England. *Ibid.*
23. In criminal cases, it is the right and duty of the Judge to instruct, and officially direct, the Jury, as to the law of the case, whilst they have also the right to judge of the law, as well as of the facts. *Holder vs. The State.* 5 Ga..... 441
24. On the trial of criminal cases, moral, and not mathematical or metaphysical certainty, is all that the law requires, or that is attainable. *Giles vs. The State.* 7 Ga..... 276
25. The doubts of a Jury, to justify an acquittal, should be reasonable, and not a mere vague conjecture or possibility of the innocence of the accused. *Ibid.*
26. Direct and irrefragable evidence cannot and need not be always produced in criminal cases; all that is necessary, is, that the Jury, whether the proof be positive or presumptive, be satisfied of the defendant's guilt. *Ibid.*
27. Where the Court charges the Jury correctly, on a point of law, it is no error that the Judge did not specify, more minutely, the shades of difference in the law, where no request is made by counsel, for this purpose. *Studstill vs. The State.* 7 Ga..... 2
28. The presiding Judge has the right, and it is his duty to declare, what the law is upon a given state of facts. *Ibid.*
29. Where the Court charges the Jury, that it is "*not a little surprised that there should be an attempt made to acquit the defendant,*" who was indicted for an assault and battery, but also instructed them, that it was their duty to acquit or convict the defendant, as the evidence might or might not bring him within the definition of the offence: *Held,* that although the first part of the charge was clearly objectionable, yet, taking the whole together, there was not such error in law, as would authorize the reversal of the judgment, and the granting of a new trial. *Keaton vs. The State.* 7 Ga..... 189
30. A writ of error does not lie to the Supreme Court, in a criminal cause, at the instance of the State. *The State vs. Jones.* 7 Ga..... 422
31. Where a witness had been subpoenaed, in a criminal prosecution, to attend Court, out of the County of his residence, in behalf of the defendant, who was acquitted on the trial: *Held,* that such witness had

- no legal authority to charge for his attendance and mileage, and collect the same on his subpoena, as an execution against the defendant. *Howell vs. Blackwell.* 7 Ga..... 448
32. When a Jury has been regularly drawn and summoned, for the trial of a slave, charged with a capital offence, according to the Statutes of this State, such slave is entitled to be tried by such Jury, and the Justices of the Inferior Court have not the right capriciously to discharge such Jury, without some good and legal cause, and summon any other Jury for the trial of such slave. *Judge, a slave, vs. The State.* 8 Ga.. 173
33. It is no objection to a Juror, drawn and summoned for the trial of a slave, who appeared and answered to his name, that the summons was left at his *residence*, and not served *personally*. *Ibid.*
34. It is no objection to a Juror, because there was a mistake as to his *middle* name, who appeared and answered, stating his right name. The mistake was properly corrected and the Juror impaneled. *Ibid.*
35. Upon the trial of a slave, for a capital offence, when the evidence, on the part of the prosecution, has closed, and the cause submitted to the Jury, on both sides, further evidence cannot be admitted, on behalf of the prosecution, against the defendant. *Ibid.*
36. Where a Juror has answered negatively, both of the questions propounded by the Act of 1843, and been found competent by triors, (who were not specially sworn for that purpose,) and been accepted by the prisoner, and sworn in chief, and the Court, to cure the irregularity, causes the Juror to be put again upon the prisoner, who objected, on the ground that he had already been sworn in chief, and was thereby understood by the presiding Judge, to insist on the Juror's sitting in the case: *Held*, that nothing had transpired, in relation to this Juror, to constitute a good challenge for cause, and that if a good cause and waived, the consent cures the irregularity. *Malone alias Hall vs. The State.* 8 Ga..... 408
37. A warrant to arrest a person accused of crime *before* indictment, must specify the offence, the authority under which it is issued, the person who is to execute it, and the person to be arrested; and the warrant of commitment must describe the offence, plainly and fully, and the time and place of its commission. *Brady vs. Davis.* 9 Ga... 73
38. A *Bench* warrant, and a warrant of commitment *after* indictment, are sufficient, if they recite the fact of indictment, and describe the offence generally. *Ibid.*
39. An officer arresting a criminal, is not authorized to charge "rail-

road fare" in his bill of costs—he is only authorized to charge *mileage*, and if the officer conveys the prisoner upon the railroad, it is at his own responsibility. *Peters alias Simpson vs. The State.* 9 Ga. 109

40. Each County is bound, by law, to keep a good and sufficient jail, for the safe-keeping of criminals, at *the charge of the County*, and if there is not such a jail, and a guard is necessary for their safe-keeping, the expenses of such guard must be paid by the County, and not by the defendants who may be guarded. *Ibid.*
41. When the defendant is convicted, and cash funds are in the hands of the arresting officer, belonging to defendant, judgment should be entered for costs, according to the Acts of 1820 and 1830, and the money applied to its satisfaction—the balance paid over to defendant. *Ibid.*
42. When a capital offence is committed by a slave, during the session of the Superior Court, and the papers are returned, it is competent for the Court to proceed to trial at that term. *Allen vs. The State.* 9 Ga. 492
43. A mittimus, not specifying the time and place of the offence, is void, and the prisoner will be discharged upon *habeas corpus*. *The State vs. Bandy. Georgia Decisions, part II.* 40
44. Upon the trial of a criminal cause, it is error in the Court, after a Juror, with eleven others, has been chosen and sworn, to discharge him upon the ground of his having absented himself from the Court house, without leave, without giving the parties an opportunity of removing his *prima facie* disqualification, occasioned by such absence. *Stanley vs The State.* 10 Ga. 82
45. When a demand for trial is made, in pursuance of the 18th section of the 14th division of the Penal Code, and a Jury is impaneled and qualified to try the prisoner, both at the term when the demand is made and at the term at which his discharge is moved, and he is not tried, he is then entitled to be *absolutely discharged and acquitted* of the crime charged in the indictment. *Kerese vs. The State.* 10 Ga. 95
46. On the trial of a defendant for murder, where the defendant admitted the homicide, but rested his defence on the ground that it was justifiable: *Held*, to be error in the Court to charge the Jury, that defendant's evidence of good character, as a peaceable man, applied only to cases where it was a question whether the homicide had been committed by the accused. *Davis vs. The State.* 10 Ga. 101
47. In such a case, it is error in the Court to charge the Jury, that "a reasonable doubt was, where it was doubtful whether a homicide had been committed, and if committed, whether the accused was the slayer." *Ibid.*

48. On the trial of a defendant for murder, where the defence is justifiable homicide, or where the defence insists upon any inferior grade of homicide to that of murder, it is the duty of the Court to give to the Jury the definition of each grade of homicide, as recognized by the Penal Code, and then leave the Jury to find him guilty of such grade as the evidence authorizes : *Held*, to be error for the Court to charge the Jury, that they must find the defendant guilty of murder, or voluntary manslaughter, or not guilty, thereby excluding from their consideration, involuntary manslaughter. *Ibid*.
49. If larceny from the house, or any other offence not capital, committed by a slave, has been done by the procurement of a free white person, the law substitutes him or her in the place of the slave, and treats them as principal in the crime. *Berry vs. The State*. 10 Ga..... 511
50. In what sense are the *Jury* in a criminal case, *judges* of the law? *Quere?* *Ibid*.
51. It is not the province of the Court to express an opinion, as to the sufficiency of the evidence in a criminal case. The Jury, alone, have the right to determine upon the force and effect of the facts and circumstances proved, and whether or not they are satisfactory in warranting them in finding the defendant guilty. *Ibid*.

CURRENCY. See *Costs*, 13.

DAMAGES.

1. The final judgment or decree of the Court in the case, in which the injunction is sanctioned, affords the only legal evidence of the measure of damages to be recovered in a suit upon the injunction bond. *Lockwood vs. Saffold*. 1 *Kelly*.....73-'4
2. The measure of damages in an action against an attorney, by his client, for money collected and not paid over, is the amount collected and not paid over, with interest thereon from the time it was demanded or from the date of its reception, if the attorney failed to give notice thereof to his client, or wilfully misapplied or appropriated it to his own use. *Nisbet vs. Lawson*. 1 *Kelly*.....286-'8
3. Damages may be increased by interest. *Ibid*.....287-'8
4. For the measure of damages in covenant upon breach of warranty, in the sale of an unsound slave, see *Broughton vs. Bodgett*. 1 *Kelly*.... 592

5. The indorsee of a negotiable promissory note, drawn in this State, payable in New York, and returned protested for non-payment, is entitled to charge five per cent. damages against the indorser, as provided by the Act of 1823, in cases of protested bills of exchange. *Howard vs. Central Bank.* 3 *Kelly*..... 378
6. In actions of trover, where there is conflicting evidence of the value of the property at the same time: *Held*, that the Jury may find the highest value proven, but are not compelled so to find; the true value, derived from all the evidence being the criterion generally, of the damages. *Foster vs. Brooks, Adm'r.* 6 *Ga.*..... 287
7. In trover for a slave, the measure of damages, as a general rule, is the value of the property, at the time of the conversion, and the value of the hire of the negro since, up to the time of the trial. *Schly vs. Lyon et al. Trustees.* 6 *Ga.*..... 530
8. Where the property sued for is not of a fixed value, but fluctuates in price, evidence may be given of the value at the time of the trial. *Ibid.*
9. In trover, by a bailee, against the general owner, the measure of damages is the value of his special property only; but where the action is against a stranger or wrong-doer, the measure of damages is the full value of the property—the bailee holding the balance beyond his own interest for the general owner. *Ibid.*
10. If the declaration allege a special contract for the rent of mills, to be paid in repairs, and it is proven on the trial, the plaintiff cannot recover on the common count, for a *quantum meruit*, but will be held to the special contract, and the measure of damages is the value of the repairs agreed to be made, and the loss sustained by the failure to make them. *Baldwin vs. Lesseur.* 8 *Ga.*..... 71
11. When the Petit Jury in a claim case, have returned a verdict giving damages against the claimant, and the verdict is appealed from, and pending the appeal, the claim is withdrawn: *Held*, that the case goes on as to the question of damages, and stands for trial as before, and no execution can issue for the damages, until the appeal is disposed of. *Strickland vs. Maddox et al.* 9 *Ga.*..... 196
12. Against a claim for *mense profits*, in the nature of damages, the value of the improvements made by the defendant, is a fair set-off, provided he took possession of the premises *bona fide*. *Beverly et al. vs. Burke.* 9 *Ga.*..... 440
13. Trespassers are not entitled to the benefit of this principle, except where the profits of the premises have been increased by repairs or

improvements which have been made. In that case, it is proper for the Jury to take into consideration the improvements or repairs, and diminish the profits by that amount, but not below the sum which the premises would have been worth without such improvements or repairs. *Ibid.*

14. Whether the defendants are trespassers, is a question of fact, to be submitted to the Jury. *Ibid.*
15. The laws of this State which authorize the opening of public roads over unenclosed lands, without just compensation: *Held*, to be void. *Parham vs. The Justices, &c.* 9 Ga..... 361
16. The value of land taken for public uses, is not restricted to its agricultural or productive qualities; but inquiry may be made as to all other legitimate purposes to which the property could be appropriated. *Harrison vs. Young.* 9 Ga..... 359
17. In an action on a bond for titles, the measure of damages is the value of the land, at the time the titles should have been made. *Bryan vs. Hambrick.* 9 Ga..... 133
See also, *Newsom vs. Harris.* *Dudley.*..... 180
18. Where a writ of error is dismissed, no damages are recoverable on the cause, in the Court below. *Collins vs. Turner.* 9 Ga..... 112

DEBT.

1. In an action of debt upon notes given in purchase of land, defendant will not be permitted to plead misrepresentations of the value and quality of the land, made by vendor, nor will the plea of partial failure of consideration avail him. *Hinton vs Scott.* *Dudley.*..... 246
2. For compendious forms in assumpsit and debt, see *Mahaffey vs. Petty et al.* 1 *Kelly*..... 265
3. The action of debt will not lie, to recover for the loan of a collateral article. *Farrar vs. Baber.* *Ga. Decisions, part II.*..... 125

DEBTOR AND CREDITOR.

1. A creditor is not bound by a contract, to receive from his debtor a smaller sum in money for his discharge from a greater, unless the money is actually paid and accepted at the time. No subsequent tender will be available; the creditor has a right to refuse it. *Evans vs. McCullen et al. Georgia Decisions, part I.*..... 33
2. A creditor at large, or one whose debt has not been carried to judgment, cannot call upon a Court of Equity to afford its aid in setting aside conveyances alleged to be voluntary and fraudulent, made by the supposed debtor, of his property. *McDermott vs. Blois et al. R. M. Charl.*..... 281
3. A creditor is not compelled to join the legatees in a suit in Equity, brought against the executor of the debtor; it is his privilege, not his duty, to join them. The executor is to sustain the person of the testator, and to defend the estate for creditors and legatees. *Maxwell vs. Maxwell. R. M. Charl.*..... 462
4. And the fact that the estate has been distributed, and is in possession of the legatees, does not vary the rule. *Ibid.*
5. A creditor, having established his claim and obtained a decree against the estate of his debtor, authorizing a levy upon said estate, in whose-soever hands it might be, will not be enjoined, at the instance of specific legatees, from proceeding against that portion of the estate in their hands, on the ground that the testator had set apart a particular portion of his estate for the payment of his debts. Creditors having superior claims to volunteers, cannot be embarrassed or retarded by such a provision. *Ibid.*
6. The Garnishment Acts of this State, may not, either in express terms, or by fair implication, have ousted Chancery of its jurisdiction over the same subject matter; still, if a bill were filed, it would be demurrable, upon the ground that there was an ample remedy at Law, unless there was something peculiar in the circumstances of the case. *Crews et al. vs. The Insurance Bank et al. 2 Kelly.*..... 154
7. A charge in a creditor's bill, that he fears that his debtor, if he gets possession of funds which he is proceeding to collect under execution, will apply them to the payment of other liens having no priority over his own, will not justify the interposition of a Court of Chancery. He must state the ground of his fears, or allege some issuable fact,

such as a fraudulent combination between his debtor and other creditors, to entitle him to relief. *Ibid.*

8. What is the proper remedy of creditors against the trust estate of their debtors, when the legal title is in the trustees? *Blake vs. Irwin.*
3 *Kelly*..... 366
9. Creditors claiming to be subrogated to the husband's rights, as against the property of the wife, have no other rights than the husband, who is their debtor, against such property. *Sayre vs. Flournoy et al.* 3
Kelly..... 551
10. General rule as to creditors' bill stated. *Thurmond et al. vs. Reese.*
3 *Kelly*..... 452
11. Creditor may file bill to set aside fraudulent conveyances. *Ibid.*
12. A satisfaction of one of several judgments, between the same parties, for the same cause, may be shown, on motion, in discharge of the others. *Tarver vs. Rankin.* 3 *Kelly*..... 214
13. Partial satisfaction of a judgment may be shown, even when the payment was for a less sum than the whole amount due, provided it was actually received and accepted in full discharge of said judgment. *Ibid.*..... 216
14. When a judgment creditor seeks the aid of a Court of Equity, to reach the equitable assets of his debtor, not the subject matter of levy and sale, he must show he has pursued his legal remedies to every available extent; but a Court of Equity will lend its aid to remove an obstruction fraudulently interposed, to prevent the property of the defendant from being made subject to the judgment lien, without a return of *nulla bona* on the execution. *Stephens vs. Beall.* 4 *Ga.*... 319
15. A judgment creditor does not acquire a specific lien upon the equitable estate of his debtor, by the return of an execution unsatisfied, but by the commencement of a suit in Equity, after the execution has been so returned. *Blake vs. Bigelow et al.* 5 *Ga.*..... 427
16. One creditor cannot attack the lien of another, until it comes in conflict with his own. *Barker et al. vs. McDougald et al.* 5 *Ga.*..... 176
17. Creditors and *bona fide* purchasers may attack a judgment for fraud, whenever it interferes with their rights, either in Law or in Equity. *Hammock vs. McBride.* 6 *Ga.*..... 178
18. A creditor may, in Equity, follow the assets of his debtor into the hands of a distributee, whether real or personal, and the Statute of

Limitations will not give the distributee a title which will defeat the creditor's claim, but the creditor must sue upon his claim, within the statutory term applicable to it; if he does not, he will be barred, unless there is a reply to the Statute which will prevent its operation.

Caldwell vs. Montgomery and Wife. 8 Ga..... 106

19. Where a creditor receives a deed to a tract of land, as collateral security for the payment of a note, which is to be given at a future time, and the creditor dies before the note is given, and the consideration of the deed thus entirely fails, it would be fraudulent in the administrator of the creditor, to retain the deed, and Equity will order the instrument to be delivered up to be cancelled. *Hollingshead, Adm'r, vs. McKenzie.* 8 Ga..... 457

20. The rule that the joint estate is to discharge the joint debts in the first place, and the separate estate, the separate debts, and that neither can invade the funds of the other, until the particular class of debts is satisfied out of it, considered and questioned. *Cleghorn vs. The Insurance Bank of Columbus.* 9 Ga..... 319

21. Even admitting the rule, as a principle of general equity, it will not be enforced to the exclusion or postponement of the joint creditors, so long as they have recourse at Law against the separate estate. *Ibid.*

22. It is only when the legal recourse of joint creditors against the separate estate is terminated, and they have no claim against those assets, except in Equity, as in case of the death, bankruptcy, (or perhaps statutory assignment in insolvency) of a partner, that the joint creditors are postponed. *Ibid.*

23. Where there are sundry *fi. fas.* against an insolvent railroad company, threatening to seize and sell the road, with its equipments, extending one hundred miles in length, through six different Counties, Equity will take jurisdiction of the matter; direct a sale of the entire property for the benefit of all concerned, and distribute the fund according to the practice and usage in Chancery, in a creditor's suit, against executors and administrators. In such a case, no other Court but that of Chancery, possesses adequate jurisdiction to reach and dispose of the entire merits. *The Macon & Western R. R. Co. vs. Parker.* 9 Ga..... 377

24. To allow the road to be cut into fragments, and separate portions sold at different sales, in the different Counties through which it passes, to different purchasers, would not only sacrifice the rights and interests of creditors, but defeat the objects and intentions of the Legislature, in granting the charter. *Ibid.*

25. Any creditor who has a claim upon the fund, but who is a nominal party to the suit, may make himself a party thereto, in fact, by coming in and presenting his claim, under the decree, and submitting himself to the jurisdiction of the Court, for its settlement and adjustment, upon the fund to be distributed. *Ibid.*

26. Where goods have been purchased in the name of, and on the credit of one co-partnership firm, and turned over to another co-partnership firm, composed of some of the same individuals, without any *bona fide* or valuable consideration being paid therefor: *Held*, that the Court of Equity will aid the judgment creditors of the co-partnership making such transfer, to follow the goods into the hands of the transferees, and require them to account for such goods, or the proceeds of the sale thereof, and apply the same in satisfaction of their judgments. *Dennis et al. vs. Ray, Receiver, &c.* 9 Ga..... 449

27. Creditors' bills may be entertained in Georgia, there being nothing in the Constitution or laws of this State repugnant to such proceedings. *Jones vs. Dougherty.* 10 Ga..... 273

28. Assignments by debtors for the benefit of creditors are, in a peculiar sense, the objects of Chancery jurisdiction. *Ibid.*

29. The remedy at Law is generally, in such cases, wholly inadequate as a measure of full relief. *Ibid.*

30. Where there is a trust fund in danger of being wasted or misapplied, a Court of Equity will interfere, upon the application of any of the creditors, either on his own behalf, or in behalf of himself and the other creditors, and by the appointment of a receiver, or in some other mode, grant relief. *Ibid.*

31. If the trustee omits to act, when required by duty to do so, or is wanting in necessary care and diligence in the due execution of the trust which he has undertaken, a Court of Equity will interfere. *Ibid.*

32. If a judgment creditor files his bill to enforce a trust executed by his debtor for the benefit of his creditors generally, it is a virtual waiver of his legal lien. *Ibid.*

33. Where the conveyance is made by the debtor directly to the creditors, the assent must be given at the time of the assignment; but if the assignment be to trustees for the use of creditors, the legal estate passes and vests in the trustees, and Chancery will compel the execution of the trust for their benefit. *Ibid.*

See *Assignments, III.; Equity, I. h; Husband and Wife, I.*

DECEIT.

1. Fraudulent representations, in sales of land, are actionable. *Baker vs. Ezzard et al. Ga. Decisions, part II*..... 112

2. If A agrees to buy a plantation for B, and B agrees to pay A what he gives for it, and A represents to B that he gave three thousand dollars for it, when, in fact, he paid a less sum, and B pays him three thousand dollars: an action on the case will lie in favor of B, against A, for the deceitful and false representation. *Adm'r of Green vs. Bryant. 2 Kelly*..... 67

3. In action for deceit, by A against B, for representations concerning the credit of C: *Held*, C was a competent witness. *Young vs. Hall. 4 Ga*..... 95

4. Declarations of B to C, at the time the letter was written, on which the action is founded, are inadmissible, unless communicated to plaintiff. *Ibid*.

5. The action lies, where a recommendation of character and credit is given, on the strength of which goods are obtained, if it be shown that the statements are false, and the defendant knew them to be so. *Ibid*.

6. It is not necessary to show that the object of the false representation was to defraud the *plaintiff* in particular. The action lies for any one injured by it. *Ibid*.

7. Neither is it essential that the person making it, is to derive benefit from it. *Ibid*.

8. It is not necessary that it should be the sole cause of the credit being given—*provided*, that without it the credit would not have been given. *Ibid*.

9. A party cannot stultify himself, by alleging his want of capacity to understand the nature of the recommendation he has given. *Ibid*.

10. If one in treaty with another, for the sale of property, misrepresents a material fact, stating it to be true, when at the same time he knows it to be false, and the other party trusts to the statement, and acts upon it, this is a positive fraud, for which Equity will rescind the contract. *Smith et al. vs Mitchell. 6 Ga*..... 458

11. Such a fraud may be perpetrated by acts, as well as by words, and

by any artifices, designed to mislead, as well as by representations.
Ibid.

12. Whether a party, thus misrepresenting a fact, knows it to be false or not, is immaterial; for the affirmation of what one does not know to be true, or believe to be true, is equally, in morals and in law, as unjustifiable as the affirmation of what is known to be positively false. It is a fraud, on account of which Equity will rescind the contract, and re-instate the parties in their original rights. *Ibid.*
13. If a party, thus affirming a fact, believes it to be true, when it is false, it is a fraud in law, for which Equity will rescind the contract. *Ibid.*
14. If a party innocently, by mistake, misrepresents a fact which is material, and to which the other party trusts, it is cause for rescinding the contract, because it operates as a surprise and an imposition upon him. *Ibid.*
15. Before relief will be granted, on the ground of inadequacy of price, the parties must be placed in *statu quo*; and on this account, the party seeking to set aside the contract is driven, necessarily, into Equity, as the remedy at Common Law is not adequate to the exigencies of the case. *Robinson vs. Schley et al.* 6 Ga..... 515
16. Fraud and damage constitute a good cause of action, and the party establishing them by proof, will be entitled to recover, to the extent that he has been injured. *Christian vs. Penn.* 7 Ga..... 434
17. In the sale of a slave, where there is a contract of warranty, the purchaser may consider the contract as a nullity, and bring his action on the case for deceit; and in such action, it is not necessary that he should set forth the contract. *Dye vs. Wall.* 6 Ga..... 584
18. The bill of sale, although not described in the declaration, is admissible to prove the sale. *Ibid.*

DEEDS.

- I. GENERALLY, CONSTRUCTION, &c.
- II. PROOF OF, AND HEREIN OF LOST DEEDS.
- III. REGISTRY.
- IV. AS TO FRAUDULENT DEEDS, SEE *ASSIGNMENT*, III. *FRAUD*, II.
- V. CANCELLATION AND REFORMATION OF DEEDS. SEE *EQUITY*, I. c.

I. GENERALLY, CONSTRUCTION, &c.

1. The recording or not recording of a deed, concerns no one, except those who derive title from the same feoffor, by a deed of subsequent date. *Roe et al. vs. Doe ex dem. Neal. Dudley*..... 168
2. Deeds more than thirty years old, need not be proved, where possession accompanies the deed from its execution. The Act of 1785, does not innovate upon the English law respecting ancient deeds. *Ibid.*
3. Recording gives no preference to deeds, unless it is done within the time prescribed by the Statute. Between deeds standing upon the same footing in other respects, the eldest is to be preferred. *Doe ex dem. Hammond vs. Roe et al. Dudley*..... 177
4. A deed conveying property to "the children of Nancy Jones," is not void for uncertainty, if it can be shown who were intended by these words, and that they were in life, and capable of taking, at the time the deed was executed; but such a deed cannot be made to include the after-born children of Nancy Jones. *Hogg and Wife vs. Odam. Dudley*.. 186
5. Where the descendants of a negro had contracted marriage with a free white person, in a neighboring State, enjoyed liberty and property for a long time, and transmitted them to her descendants, the Courts in this State presumed her free so far as to give effect to a deed made by her, until some one should assert and maintain a right to her, as his slave. *Hunter vs. Shaffer. Dudley*..... 225
6. If a specific consideration be mentioned in a deed, proof of another consideration inconsistent with that mentioned, is not admissible. *Norris vs. Ham et al. R. M. Charl*..... 267
7. But under the words "divers good and sufficient considerations," any sufficient consideration may be shewn. *Ibid.*
8. An instrument, purporting to be a deed, by which the grantor gives

- to his son certain property after his death and the death of his wife, is not a deed, but a testamentary paper, and cannot be read to the Jury in any case affecting the title to personalty, in a Court of Common Law, until it has passed to probate before the Ordinary. *Hester, Ex'r, vs. Young.* 2 *Kelly*..... 44
9. A paper having the formalities of a deed, may, notwithstanding, be a will. *Ibid*..... 45
10. In determining whether an instrument be a deed or a will, the Court will not consider what the maker believed it to be, but what, in point of law, it is. *Ibid*..... 46
11. The intention of the maker, as to the character of the estate conveyed, is the criterion by which the Court will determine whether a given paper is a deed or a will; and if the intention, gathered from the whole paper, is, that the estate is not to pass, or the instrument to take effect, until his death, it is a will and not a deed. *Ibid*..... 49
12. Instruments purporting to be deeds, using words of conveyance in *presenti*, founded on a good consideration, *warranting* the title; sealed and delivered in the presence of two witnesses, one of whom is a Justice of the Inferior Court, conveying absolutely to trustees, 1st. For the use of the grantor, during her life, and 2d. For the use of certain relations in remainder, are deeds, and not testamentary papers. *Cumming vs. Cumming et. al.* 3 *Kelly*..... 485
13. Where a paper in writing, in the form of a deed of gift, purporting to convey certain slaves to a trustee, in trust for the daughter-in-law of the donor, and her increase, with a covenant of warranty, as to the title, the donor reserving to himself a "life-time control and interest" in the slaves, was offered in evidence: *Held*, that the paper writing was a deed, and not testamentary in its character. *Jackson et al. vs. Culpepper.* 3 *Kelly*..... 573
14. To constitute an instrument in the form of a deed of gift, a testamentary paper, it is requisite that its effect should be made to depend upon the event of the death of the donor, as necessary to consummate it. *Ibid*..... 574
15. The order of the Court granting leave to sell, is necessary to the validity of an administrator's deed. *Clements vs. Henderson.* 4 *Ga.*.... 148
16. It is essential, also, that all other requisitions of the Statute, shall have been complied with. *Ibid*.
17. The recitals in the deed will be *prima facie* evidence of these last facts. *Ibid*..... 148

18. A paper executed as a deed, but stating "then the property to revert to me, *and after my death*," &c.; *Held*, to be a *will*. *Dudley vs. Mallery*. 4 *Ga.*..... 54
19. An instrument conveying slaves as an absolute gift on its face, with a condition, that if the grantee should die before the grantor, the property shall revert, and the expression, "when the grantee shall come into possession," &c. then certain things to be done, is a *deed* and not a *will*. *Spalding vs. Grigg*. 4 *Ga.*..... 75
20. The criterion for judging, is the intent of the grantor as to the estate granted, and the time when it shall take effect. *Ibid.*
21. The postponement of the time of going into possession, is very different from the title vesting *in futuro*. *Ibid.*
22. In a gift to M. S. D. for the life of W. J. D. then to her child or children living at her death, to be divided, share and share alike, to him, her or them, his, her or their executors, administrators and assigns: *Held*, the children would take as *purchasers*. *Dudley vs. Mallery*. 4 *Ga.*..... 52
23. Where there is an *express* estate created, it cannot be *implied* that a different estate was *intended*. Is not the doctrine of *implied* estates confined to wills? *Ibid.*
24. M. D. made a deed in these words: "And if it should happen that M. S. D. should die, *leaving* no child or children by W. J. D. then in trust for the maintenance and support of said W. J. D. and his child or children:" *Held*, that the *fee* never vested in W. J. D. *Ibid.*
25. A Court of Equity will not decree the cancellation of conveyances, where any thing has been received, until re-payment is made. *Milner et al. vs. Cotten et al.* 5 *Ga.*..... 341
26. An instrument may be a will in part and a deed in part. *Robinson vs. Schly and Cooper*. 6 *Ga.*..... 515
27. An instrument conveying negroes and their future increase, absolutely, to J. S. his heirs and assigns, "but I do hereby save and reserve to myself, a life estate in the property above conveyed to said J. S. his heirs and assigns:" *Held*, to be a *deed* and not a *will*. *Ibid.*
28. A remainder in personalty may be created by deed, reserving a life estate to the grantor or any one else. *Ibid.*
29. A conveyance from M. D. M. to J. S. his heirs and assigns, of "all

the cattle, horses, furniture, bank stock, money, &c. which she might leave or be possessed of, at her death," is a *will* and not a *deed*. *Ibid*.

30. If a deed of bargain and sale be executed by an infant, it may be avoided by another deed of bargain and sale, made to a third person, without entry by the infant, when he arrives at age, in case the land continue in possession of the infant, or be vacant or uncultivated. *Harris vs. Camron et al.* 6 Ga..... 382
31. If, when the second deed be executed, the lands be holden adversely to the infant, it seems that the second deed will not amount to a revocation of the first conveyance. *Ibid*.
32. Where a Sheriff sells land under execution, and goes out of office before executing title to the purchaser, his successor in office may execute a title to such purchaser, without an order of Court. *Fretwell vs. Doe ex dem. Morrow.* 7 Ga..... 264
33. Where a Constable levies a Justice's Court *fi. fa.* on land, and delivers the same over to the Sheriff, for the purpose of sale, as provided in the Act of 1811, such Sheriff is lawfully seized of the land, to sell the same and to convey title to the purchaser thereof. *Ibid*.
34. An instrument by which A. conveys certain negroes to B, with this condition: "nevertheless, I (the donor) have the full use of the said negroes, during my natural lifetime; and at the time of my death, the said negroes and their increase shall rise and become the property of the said B." *Held*, to be a will and not a deed. *Crary vs. Rawlins.* 8 Ga..... 450
35. The Statute 32d Henry VIII. is of force in this State, and a deed made by an infant, while under age, will not be avoided by the execution of a deed after he arrives at the age of twenty-one, when the possession of the land is held adversely to him, but the latter deed will be void under the Statute. *Harrison vs. Adcock et al.* 8 Ga.... 68
36. Where a deed conveyed a negro to certain parties, and added "*provided always*, that this *deed of gift* shall be the property of J. T. until M. T. arrives at the age of 21 years." *Held*, that J. T. took no title to the property conveyed. *Maulden vs. Thomas et al.* 9 Ga..... 174
37. A copy deed established according to law, is to be taken in lieu of the original, for all purposes whatever. *Beverly and another vs. Burke.* 9 Ga..... 440
38. A reservation in a deed, for the benefit of the grantor, must be strictly complied with. *House et al. vs. Palmer.* 9 Ga..... 497

39. If the vendor, in selling a lot of land, retains the right to test it for gold within 18 months, and if found profitable, to work it, he must make the examination and give notice of the result within the time limited—otherwise, the privilege will be forfeited. *Ibid.*
40. A deed void as to creditors, may nevertheless be good between the parties. *Jones vs. Dougherty.* 10 Ga..... 273
41. In a Sheriff's deed, the property must be described with reasonable certainty, and he can sell nothing under an execution, which the plaintiff cannot enable him so to describe. *Whatley vs. Lessee of Newsom.* 10 Ga..... 74
42. Where an instrument, in the form of a deed, purported to convey certain property therein named, in which the party conveying "reserved to herself the use of all the property during her natural life, then to go to the above named persons, and from thenceforth to be their property absolutely, without any manner of condition:" Held, that the instrument was a testamentary paper and not a deed. *Symms vs. Arnold and Wife.* 10 Ga..... 508
43. By the Common Law, unless there was an express agreement to the contrary, the cost of the conveyance falls upon the purchaser. *Winter vs. Jones.* 10 Ga..... 190
44. A grantor may convey the fee, reserving certain rights to himself, his heirs, &c. *Holmes vs. Martin.* 10 Ga..... 503

II. PROOF OF, AND HEREIN OF LOST DEEDS.

1. Deeds more than 30 years old, need not be proved, where possession accompanies the deed from its execution. The Act of 1785 does not innovate upon the English law respecting ancient deeds. *Roe et al. vs. Doe et al. Dudley...* 168
2. The execution of a deed or other instrument of writing, thirty years old, need not be proven, but is admissible in evidence, as an ancient document, provided its genuineness be satisfactorily established, by proof that it came from the proper custody, &c. *Adm'rs. of McClesky vs. Leadbetter.* 1 Kelly..... 557
3. A deed to land, delivered in the presence of two subscribing witnesses, and acknowledged before a Justice of the Peace, and recorded in the Clerk's office of the Superior Court, in the County where the land lies, though the acknowledgment is without date or place, is admissible in evidence, in the Courts of Georgia, under the Registry Acts thereof, without further proof. *Doe ex dem. Truluck et al. vs. Peebles et al.* 1 Kelly..... 5

4. In such a case, the Court will presume, in the absence of proof to the contrary, that the acknowledgment before the Magistrate was made when the deed itself purports to have been made, and at the time it purports to bear date. *Ibid.*
5. If the subscribing witness to a deed reside without the State, secondary evidence must be resorted to, to prove its execution. *Harris vs. Camron.* 6 *Ga.*..... 382
6. Probate of a deed, by a subscribing witness, before the Clerk of the Superior Court, does not authorize it to go to record, and the copy of a deed so recorded, cannot be given in evidence. *Papot vs. Gibson.* 7 *Ga.* 533
7. When the subscribing witness to an instrument resides beyond the jurisdiction of the Court, the regular mode to prove its execution, is to prove the hand-writing of the witness, but where a receipt or other written instrument is more than thirty years old, its execution need not be proved to admit it in evidence, although the subscribing witness may be living. *Settle vs. Allison et al.* 8 *Ga.*..... 201
8. A copy deed, established according to law, is to be taken in lieu of the original, for all purposes whatever. *Beverly et al. vs. Burke.* 9 *Ga.*..... 440
9. If the original deed was never recorded in the County where the land lies, the copy, unless registered, cannot be read in evidence, without proof of its execution. *Ibid.*
10. A copy deed established by law, cannot be read in evidence, without proof of its execution, unless the original deed was recorded in the County where the land lies. *Ibid.*
11. If a party wishes to introduce a copy deed in evidence, it will be a sufficient compliance with the rule, to swear that the original deed, in his belief, is lost or destroyed, and that it is not in his custody, power or control. *Ratteree vs. Nelson.* 10 *Ga.*..... 439
12. The ancient, fixed and universal rule is, that the attesting witnesses to a deed must be produced, to prove any fact connected with the execution of the instrument, unless their absence is accounted for; and the fact that others may know more of the transaction, will not dispense with their testimony. *Ellis vs. The Lessee of Smith.* 10 *Ga.*... 253
13. The acknowledgment, by the party himself, that he executed the deed, or even his admission in answer to a bill filed for discovery, has been held not to dispense with the testimony of the subscribing witnesses. *Ibid.*

14. And the rule is the same, whether the acknowledgment is offered in evidence against the party himself who made it, or a third person. *Ibid.*
15. The exceptions to the general rule stated. *Ibid.*
16. The provision in the Judiciary Act of 1799, inhibiting defendants from denying any deed, &c. except on oath, applies only to such as are the foundation of the suit, and not to such as are collaterally introduced in evidence. *Williams vs. Rawlins.* 10 Ga..... 491
- See *Bonds*, I. 16.

III. REGISTRY.

1. The recording or not recording of a deed, concerns no one except those who derive their title from the same feoffor, by a deed of subsequent date. *Roe et al. vs. Doe ex dem. et al. Dudley*..... 168
2. Recording gives no preferences to deeds, unless it is done within the time prescribed by the Statute. Between deeds standing upon the same footing, in other respects, the oldest is to be preferred. *Doe ex dem. Hammond vs. Roe et al. Dudley*..... 177
3. There was no law of Georgia, of force in 1795, requiring a deed of personal property to be recorded. *Merel vs. Houston. R. M., Charl*.... 284
4. A purchaser cannot be bound by the constructive notice afforded by the record of a deed, not required by law to be recorded. *Ibid.*
5. The registry of a deed not proven or acknowledged according to law, is not constructive notice to a subsequent purchaser. *Herndon vs. Doe ex dem. Kimball.* 7 Ga. 432. *Papot vs. Gibson, decision of Judge Lumpkin.* 7 Ga..... 533
6. Probate of a deed, by a subscribing witness, before the Clerk of the Superior Court, does not authorize it to go to record, and the copy of a deed so recorded, cannot be given in evidence. *Papot vs. Gibson.* 7 Ga..... 533
7. Failure to record a deed concerns no person except those who derive title from the same feoffor, by a deed of subsequent date. *Whittington vs. Doe ex dem. Wright.* 9 Ga..... 23
8. The Statute of North Carolina requires deeds of gift to be *proven and recorded* in one year, or else to be void: *Held*, that the *registration* of a deed is not sufficient evidence of *probate*. *Maulden vs. Thomas et al.* 9 Ga..... 174

9. A copy deed established by law, cannot be read in evidence, without proof of its execution, unless the original deed was recorded in the County where the land lies. *Beverly and another vs. Burke.* 9 Ga... 440
10. Record on the *minutes* of the Court establishing it, does not dispense with the statutory registration. *Ibid.*
11. A bond for titles is not authorized by law to be registered. *Ibid.*
12. To defeat the title of a *bona fide* purchaser, in favor of a prior voluntary conveyance, notice must be brought home to him; the registry of the deed is not such notice. *Fowler vs. Waldrip.* 10 Ga..... 350
13. A purchaser at Sheriff's sale, who has his deed first recorded, will gain the same preference over an unrecorded deed, as if he had bought directly from the debtor himself. *Ellis vs. The Lessee of Smith.* 10 Ga..... 253

DEMAND. See *Pleading*.

DEPOSITIONS. See *Evidence*, III.

DEVISE AND LEGACY.

1. The words, "in the event of its becoming necessary," in a will, are the same in effect with the words "if it become necessary, provided it should become, if it should happen to become," which clearly indicate a conditional bequest and not a limitation. *Mackay et al. vs. Moore et al. Dudley*..... 95
2. If the condition precedent become impossible even by the act of God, the estate would never arise. *Ibid.*
3. Although, as a general rule, it is true, that the gift of the interest vests the body of a legacy, yet in such cases, the gift of the interest must be unconditional, and placed under the immediate control of the legatee. *Roberts, Adm'r, vs. Carr, Ex'r. Dudley*..... 178
4. The words, "I give unto my brother, J. G. the sum of \$1,000, to be vested in bank stock, and the net proceeds to be annually drawn and paid to him by my executors, during the life-time of the said J. G." were held to be such a gift of the mere interest, as not to vest the body of the legacy. *Ibid.*

5. If a person making his will, direct that "if any of his slaves should desire to go to the African Colony, they should be permitted to go, and their expenses to the port of embarkation should be paid," such will is not void, under the Act of 1818, nor is it inconsistent with the policy of our laws, but ought to be executed. *Jordan vs. Heirs of Bradley. Dudley*..... 170
6. An executory devise to vest on A's dying without issue generally, that is, on an indefinite failure of issue, is not good, because it tends to create a perpetuity. *Atwell's Ex'rs vs. Barney. Dudley*..... 207
7. But Courts favoring the intention of the testator, particularly in devises of personal property, take hold of any circumstances or words of the will, which limit the general expression of "dying without issue," and afford a ground for construing the limitation to be a dying without issue living at the death of the party, in order to support the devise over: so the words "after her death, if no lawful issue," were construed to mean, without lawful issue at the death of the deceased, and to constitute a good limitation in an executory devise. *Ibid*.
8. A testator may limit the extent of power conferred by him, and prescribe the particular manner of executing it, and the agent is as little able to vary the manner, as to transcend the limit, for in either case he would be found usurping, instead of executing authority. *Mackay et al. vs. Moore, Ex'r. Dudley*..... 95
9. An heir or legatee, is not entitled to take possession of any part of the estate of his ancestor or testator, until it be delivered to him by the act of the legal representative or the law. *Albritton vs. Bird. R. M. Charl*..... 93
10. A creditor having established his claim and obtained a decree against the estate of his debtor, authorizing a levy upon said estate, in whose-soever hands it might be, will not be enjoined, at the instance of specific legatees, from proceeding against that portion of the estate in their hands, on the ground that the testator had set apart a particular portion of his estate, for the payment of his debts. Creditors having superior claims to volunteers, cannot be embarrassed or retarded by such a provision. *Maxwell vs. Maxwell. R. M. Charl*..... 462
11. Where a testator bequeathed to his daughter certain negroes "during her natural life, and the heirs of her body forever:" *Held*, that the words must be received in their technical signification, there being nothing in the will to authorize the belief that the testator may have used the words improperly, and not in their lawful meaning. *Choice vs. Marshall. 1 Kelly*.....102-'7
12. In the construction of wills, the intention, so far as it is consistent with laws of the land, shall govern. *Ibid*..... 102

13. Where the testator bequeathed certain negroes, at his mother's death, to his son Robert, his heirs and assigns forever, "but if Robert should live single, and die without a lawful heir of his body, the above property is to be equally divided between my three sons, James, John and Lovett," it was held to be a limitation over, upon an indefinite failure of heirs or issue, and therefore void, as being too remote, according to the rules of the Common Law, and vested the property in the first taker: *Held*, also, that if the bequest over had been good at Common Law, our Statute of 1821 would have vested the property in the first taker. *Robinson vs. McDonald.* 2 *Kelly*..... 120

14. If an estate is bequeathed to A, in trust for B, during his life, with a power of appointment in B, of the fee by will, and in the event of B dying intestate, remainder in fee to the heirs at law of B: *Held*, that B having died without exercising the power, it is void, and the limitation over takes effect as though there was no such power in the will. *Edmondson and Wife vs. Dyson.* 2 *Kelly*..... 311

15. A testator devises property to his son William and his children (William at the time having no children) with devise over to the heirs named in his will, upon William's dying without having a child or children: *Held*, that William took an estate tail, with remainder to the heirs named in the will *Wiley, Parish & Co. et al. vs. Smith et al.* 3 *Kelly*..... 556

16. A testator devises property to his two sons W. and B. and their heirs, with devise over to the heirs named in his will, upon W. and B. dying without child or children: *Held*, that the word heir in the antecedent limitation is synonymous with issue or heirs of the body, and that W. and B. took an estate tail, with remainder to the heirs named in the will. *Ibid.*..... 564

17. An estate tail, by the laws of England, is converted into a fee simple estate by the Statute of Georgia. *Ibid.*..... 569

18. Where a testator, by his will, bequeaths certain property to trustees, in trust for his son and his wife, and his four children then living, and to any child or children which the testator's said son may hereafter have born, for the use of, support, and maintenance of the testator's said son and his family; and for the support, education and settlement of the said children of testator's son: *Held*, that it was the intention of testator to include after-born children of his son, as well as those living at the testator's death. *Held*, also, that testator's son and his wife were entitled to the use and benefit of two shares of the property bequeathed, for their maintenance and support, and that each of the children of testator's son was entitled to one share of the property as a settlement, on arriving at the age of twenty-one years, or when the females should marry, liable to refund the proportion of their

respective shares, in the event there should be after-born children.
Napier et al. vs. Howard. 3 *Kelly*..... 201

19. The increase, by way of hire, of a specific legacy, belongs to the legatee, though the enjoyment of the legacy be postponed. *Graybill et al. vs. Warren.* 4 *Ga.*..... 528

20. R. F. by his will, bequeathed all his property to his wife, during her life or widowhood. "In case she should die or exchange her situation by marriage," then a sale to be made of all his property, and the proceeds to be equally divided among his children: *Held*, that the children took a vested remainder at his death. *McGinnis, Adm'r. vs. Foster, Ex'r.* 4 *Ga.*..... 377

21. A bequest of personalty, to testator's "wife, during her natural life, and at her death, to be equally divided between all my surviving children, and the legal representatives of such as may be deceased," creates a vested remainder in the children living at the time of testator's death. *Vickers vs. Stone.* 4 *Ga.*..... 461

22. As a general rule, specific legacies of a productive nature, bear interest. *Beal et ux. vs. Crafton.* 5 *Ga.*..... 301

23. Where a testator bequeathed to his wife a certain negro slave, so long as she should reside on a particular plantation, and made no other disposition of her, and the negro was duly distributed to the legatees under the will: *Held*, that an administrator *de bonis non*, &c. could not recover possession of the negro after the death of the legatee. *Bates, Adm'r, &c. vs. Woolfork.* 5 *Ga.*..... 329

24. Where a decree was obtained in favor of legatees, against the executors of the testator's will, for their legacies under it, and the executors have admitted assets in their hands sufficient to pay them: *Held*, that property which had been distributed to another legatee, under the will, with the assent of the executors, could not be first seized and sold, in satisfaction of such decree against the executors alone, when it did not appear there was any deficiency of assets, to pay all the legacies, and the legatee whose property was taken was no party to the decree; notwithstanding it was declared by the decree, that it should be a lien upon, and bind the whole estate of the testator. The estate of the testator, in the hands of the executors, is first liable for the satisfaction of the decree, before such portion of it as had been distributed to legatees who were not parties to the decree, and who had been in the possession of it for several years, with the assent of the executors. *Scranton et al. vs. Demere et al.* 6 *Ga.*..... 92

25. The assent of the executor to a legacy, may be implied from possession.

sion of the property by the legatee; and assent given to the tenant for life, will enure to the benefit of the remainder-man in fee. *Jordan vs. Thornton et al.* 7 Ga..... 517

26. When it appeared that the father of the defendant, by his last will and testament, bequeathed to him "the money advanced for him," and that the notes sued on were given by the defendant to the testator, for money so advanced: *Held*, that at Law the executors of testator had the right to recover the amount of the notes from the defendant by suit, notwithstanding the estate of the testator was solvent and able to pay all the debts and specific legacies bequeathed by the will; and when so recovered, to dispose of the same, in the due course of administration under the will: *Brewer vs. Brewer, Ex'rs.* 7 Ga..... 584

27. R. J. by his last will, bequeathed a large property to certain persons, upon the following conditions, viz: Equally to my son W. and to my daughters E. P. K. and S.; and as respects my said daughters, I give the same to them, and to them only, personally, individually and exclusively, and to their children, and not to their husbands. The property and interest which may fall to and belong to my daughters, is hereby willed and devised to them and each of them and their children, the children of their bodies, and not to their present or future husbands, or either of them; nor to belong, either in right or in disposition, to their husbands, but as before mentioned, is hereby willed and decreed, *bona fide*, in right and use, to my daughters and their children respectively, and to them only, so long as they or either of them shall live. In the division, the said W. E. P. K. and S. taking share and share alike—the latter for themselves and children—each mother representing one share or part." *Held*, that under this clause, each daughter takes an estate for life to her separate use; and after death, remainder to her children, born and to be born. *Jones et al. vs. Jones, Ex'r.* 7 Ga..... 76

28. Where a testator made the following bequest: "I lend the following negroes, (naming them,) with all their increase, to A, B, C, children of my first wife; this loan to continue during their natural lives, and at their death, the property to be equally divided among the children, of A and B; and in event of C having child or children, they also to have one third part. But if C dies childless, the whole, then, shall go to the children of A and B. It is my desire that John, one of the negroes mentioned in this article, should go into the possession of A, and be considered so much of her part. It is my desire, also, that no part of the above mentioned negroes should come into the hands or possession of the husband of C, but it shall be held by A and B, and go to their children, if her husband survives C." *Held*, on a bill filed by one of the children of A, for a distribution of the property in the lifetime of B, that it was the intention of the testator that his three daughters should hold the possession of the life estate in the property during their joint lives, or the life

- of the survivor, and that the grand children of the testator were not entitled to a distribution, until the death of the last surviving daughter. *Riorden, Guardian, vs. Holiday et al.* 8 Ga..... 79
29. A testator bequeathed as follows: "I farther will that one hundred dollars per annum be paid out of the profits of said bakery, to B. Moore, of the City of New York, for the use of my mother, Mrs. Elizabeth Wagner; and also, the like sum of one hundred dollars, out of said profits, to my sister, Mrs. Margaret Williams, together with eighty dollars, lent by her to me, in New York, with interest from date." *Held*, that the bequest to Mrs. Williams gives her a specific sum of one hundred dollars, and not an annuity of one hundred dollars. *Williams vs. McIntire, Adm'r.* 8 Ga..... 34
30. P devised the whole of his estate to G, as trustee and testamentary guardian, for the exclusive use of his three daughters, W. A. and B. and their increase, if any, to be distributed, &c. and in the event of the death of either the daughters, without issue, her portion of the property to go to the survivor or survivors; if two, share and share alike, if one, to her exclusively; and should all three die, without increase or issue, G, the trustee and testamentary guardian, is directed to deliver over the entire estate to C. E. and he is vested with plenary power to do any way with the property that in his wisdom may seem best: *Held*, that the will did not create an estate tail, especially since such estates were long since abolished by law in this State, but an estate for life in the daughters, with remainder in fee to their children or grand children, and that if the daughters died without children or grand children, it was a good limitation over in fee, by way of executory devise to C. E. on failure of increase on the death of the daughters. *Benton vs. Patterson and another.* 8 Ga..... 146
31. Where valid articles of separation give to the wife the power to dispose of property at her death, (settled for her provision for life,) as she may choose to do, a will by her, while a *feme covert*, will be supported. *Chapman vs. Gray, Ex'r.* 8 Ga..... 337
32. Where B, by his last will and testament, bequeathed certain negroes to his daughter, as follows: "To my daughter, C. R. P. I give and bequeath to the heirs of her body the following negroes, &c.; should she have no heirs from her body, she is to have the use of said negroes her lifetime, and at her death, should she die without any heirs from her body, the negroes and their increase to return to my son John S. Bailey, as his property." *Held*, that the daughter took a life estate, and her children a remainder, as purchasers, and not by descent. *Kemp, Adm'r, vs. Daniel, pro. ami, &c.* 8 Ga..... 385
33. One legatee who has received his legacy, and no more, cannot be called on to contribute to a co-legatee, the executor being solvent and

- admitting assets in his hands sufficient to pay the other legacy. *Dé-
mere et al. vs. Scranton et al.* 8 Ga..... 43
34. A residuary legatee is not liable to refund to another legatee, unless there was an original deficiency of assets, and in cases where the payment of his legacy would amount to a devastavit. *Ibid.*
35. A devise to a charitable use, will be sustained and carried out in Georgia. *Beall et al. vs. Ex'rs of Fox.* 4 Ga..... 404
36. Where testatrix by her will, made the following bequest: "I give and bequeath to my son, Robert W. Carlton, during his natural life, and at his death, to the lawful begotten heirs of his body, the following property, to wit: Aggy, a woman about thirty-two years of age, and the rest of her children, to wit: James, Caroline, Sarah, Manuel and John, and all their increase forever. Nevertheless, if the said Robert W. Carlton should die without an heir, then it is my desire that the above named and described negroes and their increase, be set free *at his death*." *Held*, that the disposition of the property was good as an executory bequest, and that the children of Robert W. Carlton took the same as *purchasers* under the will, and not as heirs *generally* by descent. *Carlton and another vs. Price.* 10 Ga..... 495
- DISCONTINUANCE. See *Continuance*, 3.
- DISCOVERY AT LAW. See *Evidence*, III.
- DISTRESS. See *Rent*.
- DISTRIBUTION. See *Administrators, &c.*
- DIVORCE. See *Husband and Wife*, IV.
- DORMANT JUDGMENT. See *Judgment*, VI.

DOWER.

1. The husband, by alienation, cannot divest the estate which the law casts on the wife, nor can it be done by public sale, under an execution. *Wakeman and Wife vs. Roache. Dudley*..... 123
2. A widow has no right to claim an interest in advancements made to children and brought into hotch-pot, but is confined to her husband's estate, at the time of his death. *Wright vs. Wright. Dudley*..... 251

3. The Statute of Limitations of 1767 is no bar to an application for the assignment of dower. *Wakeman et ux. vs. Roach. Dudley*..... 123
4. At Common Law, the widow has no estate in her husband's lands, until after assignment, and cannot retain possession as against those holding the fee. She has no right to tarry in her husband's house, beyond the term allowed her as quarantine, and it is not until after assignment that she has such a vested estate as to maintain ejectment. Not so in Georgia—so far as the mansion house and tenement are concerned, the Statute giving her these as a part of her dower estate, she being in possession, may retain it against the heirs or purchasers before assignment. *Rambo et al. vs Bell. 3 Kelly*..... 208
5. When it is not competent to go into evidence that the widow had accepted a provision under her husband's will in lieu of dower. *Ibid.*
6. A claim of dower is such an incumbrance as will constitute a breach of the warranty of title in a deed. *Leary vs. Durham. 4 Ga*..... 592
7. The judgment affirming the admeasurement of the commissioners, is sufficient proof of an eviction. *Ibid.*
8. The possession of land by the tenant in dower, or as the co-distributee of an estate, is such an interest as may be seized and sold under execution. *Pitts vs. Hendrick. 6 Ga*..... 452
9. In order to put the widow to her election between the provisions made in her favor by the will of the testator, and her legal right to dower in his estate, such testamentary provision in her favor, must be declared in *express* terms, to be given in lieu of dower, or the intention of the testator to that effect, must be deduced by clear and manifest implication, from the will, founded on the fact, that the claim of dower would be inconsistent with the will, or so repugnant to its provisions, as necessarily to *disturb* and *defeat* them. *Tooke et al. vs. Mason and Wife et al. 7 Ga*..... 20
10. The Act of 1839, which limits the widow's application for dower, to seven years from the death of her husband, operates prospectively and does not apply to cases where the husband died before the passage of that Act. *Ibid.*
11. The right of dower is not within the Act of Limitations of 1767. *Ibid.*
12. To constitute an *equitable* bar to the widow's claim of dower, by her acts and acquiescence in the provisions of the will for her benefit, so as to raise the presumption that she had made her election to accept such testamentary provisions in lieu of dower, it must be shown that she was cognizant of her rights, and acted understandingly. *Ibid.*

13. The widow dying in less than one year after administration upon the estate of her husband, without having elected to take a child's part of the real estate, her executor cannot recover it after her death. *Beavers, Ex'r, vs. Winn, Adm'r.* 9 Ga..... 189
14. In this State, a widow is entitled to dower in the wild and uncultivated lands of which her husband was seized during the coverture, at Common Law, and of such as he may be seized and possessed of at the time of his death, under the Statute. *Chapman vs. Schroder.* 10 Ga. 321
15. On the application for dower, under the Act of 1824, the owner of the land is such a party in interest, as the Statute contemplates shall be notified of the intended application. *Ibid.*
16. Where the defendant derives his title from the husband of the demandant, who was an alien: *Held*, that the defendant was *estopped* from denying the seizure of the husband on that ground. *Ibid.*
17. The widow's right to dower is not within the Statute of Limitations prior to the Act of 1839, nor is it barred by lapse of time merely, independently of other equitable circumstances. *Ibid.*
18. Where, by an agreement between the attorney of the demandant and the defendant, to dismiss the application on payment of costs by the latter, the same was dismissed: *Held*, to be no settlement of the case or bar to the claim of dower. *Ibid.*
19. The claim of a demandant to dower, is a *legal* claim, and if she has a legal title to dower in the lot of land, whether the defendant purchased with or without *notice*, for a valuable consideration, does not in the least affect or impair that legal title. *Ibid.*
20. The proper time to raise the objection to the manner and extent of the assignment of dower, is when the return of the commissioners is made to the Court, as is provided in the fourth section of the Act of 1825. *Ibid.*
21. Three facts, by the Common Law, must be established, to maintain a demand for dower—marriage, seizure and death. *Ibid.*
22. Where judgments were obtained against a husband, prior to his marriage, and his estate is insolvent: *Held*, on the death of the husband, the wife is entitled to dower in his lands, which have not been sold under the judgment; that the judgment created a *lien* on the lands, but the *seizure* was not divested until levy and sale. *Greene, Adm'r, vs. Cawsey.* 10 Ga..... 435

DURESS.

1. Legal arrest is not duress. *Gresham vs. Landers et al. Ga. Decisions, part II.*..... 149
2. It is no plea for a surety that a bond was obtained by duress. *Spicer vs. The State. 9 Ga.*..... 49

EJECTMENT.

1. By a legislative Act, passed in 1760, the town commons, streets, lanes, &c. in the Town of Savannah were declared to be the common property of the lot-holders in said Town, and commissioners were appointed to carry the Act into execution. By the Act of 1787, a President and Wardens were directed to be chosen, with power to make by-laws, assessments, and to lease or sell any public lots, &c. By the Act of 1789, the Town was styled the City of Savannah, and a Mayor and Aldermen were directed to be elected, and were declared to be a body politic, with the power of acquiring and holding property, real and personal, for the benefit of said City: *Held*, that by the Act of 1760, the legal title to the common streets, &c. vested in the lot-holders or public, in their collective capacity, as a corporation *sub modo*, which became transferred by the Act of 1787, to the President and Wardens, as the legal representative of the public, and for its benefit, and finally, by Act of 1789, became vested in the "Mayor and Aldermen of the City of Savannah." *Mayor and Aldermen, &c. vs. President, &c. of Steamboat Co. of Georgia. R. M. Charl.*..... 342
2. Where the legal title to the soil is in a corporation, (or the public,) it may maintain an action of ejectment, to recover the possession of a street. *Ibid.*
3. *Held*, further, that if the legal title did not pass by the Acts of 1760 and 1787, to the public or lot-holders, as a corporation *sub modo*, then as it could not vest in them individually, and there was no one capable of taking and holding at the same time of the grant, such grant of the town common, streets, &c. must be considered as a dedication to public uses, which, by operation of law, became vested in the Mayor and Aldermen of the City of Savannah, as soon as they were incorporated. *Ibid.*
4. *Held*, that for the purposes of sustaining the action of ejectment, the

term "lots," used in the Act of 1787, and which the Wardens were authorized "to let, lease or rent," might be construed to embrace the streets, town common, &c. so as to enable the corporation of Savannah to make a demise of a public street. *Ibid.*

5. Where there are several demises laid in an action of ejectment, one from the grantor, another from the grantee of a deed, void under the Statute 32 Henry VIII.: *Held*, that the plaintiff might recover, though not on the demise of the grantee only. *Pitts vs. Bullard.* 3 *Kelly*.. 18
6. The heirs at law may maintain ejectment to recover the possession of land against a mere wrong-doer. *Carruthers vs. Bailey.* 3 *Kelly*.... 108
7. So, the administrator for the payment of debts, or the making of distribution. *Ibid*..... 110
8. A demise in ejectment cannot be stricken out because the name of the lessor is used against his consent, if the plaintiff offers to indemnify him against all loss, and if the use of his name be necessary to the assertion of the plaintiff's rights. *Fain vs. Gathright.* 5 *Ga*..... 6
9. A party who brings a second action of ejectment, after being ousted under a previous recovery against him, must produce paramount title. *Doe ex dem. Johnson vs. Lancaster.* 5 *Ga*..... 39
10. Where the plaintiff in ejectment had been in possession seven years under color of title, holding adversely: *Held*, that the action was maintainable against a defendant who had a regular chain of title, but had entered after the expiration of the seven years. *Watkins vs. Woolfolk.* 5 *Ga*..... 261
11. Prior possession will prevail in ejectment over a subsequent possession, acquired by mere entry without any lawful right. *Doe ex dem. Johnson vs. Lancaster.* 5 *Ga*..... 39
12. But where the subsequent possession is acquired by a recovery in ejectment, the entry of the defendant being lawful, affords a better presumption of right than the prior possession, and the record of the former recovery may be given in evidence, if between the same parties. *Ibid.*
13. Seven years' adverse, uninterrupted and continuous possession, confers a complete title to lands, tenements and hereditaments, in this State. *Ibid.*
14. A fraudulent combination between the covenantee and the plaintiff in ejectment, will preclude the idea of an eviction upon title paramount. *Davies et al. vs. Smith.* 5 *Ga*..... 274

15. A brings ejectment for land, and holds B's deed as part of his claim of title. B is offered as a witness for defendant, and upon his *voir dire* states, that he never made the deed under which A claims; that he has given his bond for titles to the defendant, and holds his notes, and had been notified by him to appear and defend: *Held*, that B was an incompetent witness. *Fain vs. Gathright*. 5 Ga..... 6
16. There can be no special pleading in ejectment; for the *consent* rule which admits lease, entry and ouster, compels the defendant to plead only "not guilty," or the Statute of Limitations. *Doe ex dem. Cumming vs. Butler*. 6 Ga..... 88
17. The general issue in ejectment denies the defendant's possession, as well as the plaintiff's title. *Ibid*.
18. Is it competent for the lessor of the plaintiff, in an action of ejectment, to prevent a recovery by the conveyance of the premises to the defendant after suit brought? *Harris vs. Camron*. 6 Ga..... 382
19. The name of a party may be used as the lessee of the plaintiff in ejectment, even against his consent, where he is indemnified against costs, provided such use of his name is necessary and important to the assertion and successful prosecution of the rights of another party. *English vs. Doe ex dem. Register*. 7 Ga..... 387
20. The consent rule in ejectment is always considered as filed, and admits lease, entry and ouster. *Hilliard vs. Doe ex dem. Connelly*. 7 Ga..... 172
21. The fictitious form of pleading in ejectment: *Held*, to be sufficient. *Ibid*.
22. A plaintiff in ejectment may amend his declaration, extending the time of his demise, after the case has been submitted to the Jury, according to the discretion of the Court, under the 54th Common Law Rule of Practice. *English vs. Doe ex dem. Register*. 7 Ga..... 387
23. An executor may bring ejectment to recover lands, but his right to recover depends upon the will, and that must be produced as part of his title. *Sorrell, Ex'r, vs. Ham et al.* 9 Ga..... 55
24. Against a claim for *mesne* profits in the nature of damages, the value of the improvements made by the defendant, is a fair set-off, provided he took possession of the premises, *bona fide*. *Beverly and another vs. Burke*. 9 Ga..... 440
25. *Trespassers* are not entitled to the benefit of this principle, except

where the profits of the premises have been increased by the repairs or improvements which have been made. In that case, it is proper for the Jury to take into consideration the improvements or repairs, and diminish the profits by that amount, but not below the sum which the premises would have been worth without such improvements or repairs. *Ibid.*

26. Whether the defendants are trespassers, is a question of fact, to be submitted to the Jury. *Ibid.*
27. Vendees under judicial sales shall not be put to the same proof in ejectment as in common cases of persons buying lands from individuals. *Whatley vs. Doe ex dem. Newsom.* 9 Ga..... 74
28. A purchaser at Sheriff's sale, has only to show his deed, the execution under which the land was sold, and prove title in the defendant, or possession since the rendition of the judgment, and the *onus* is cast upon the opposite party. *Ibid.*
29. A previous warrantor of the title may be a co-defendant in an action of ejectment, provided he would be amenable in damages in case of eviction. *Redwine vs. Brown et al.* 10 Ga..... 311
30. Either party in an ejectment cause, is entitled to impeach by proof, and without making an affidavit that it is a forgery, the genuineness of a deed tendered in evidence, and if necessary, time will be given, upon suitable showing, to procure testimony. *Williams vs. Rawlins.* 10 Ga..... 419
31. Where plaintiff in ejectment has shown a good title in himself, and the defendant relies upon a paramount outstanding title, it is not error in the Court to instruct the Jury, that he must show a clear and indisputable title in some one else. *Salter vs. Lessee of Williams.* 10 Ga..... 186
32. A bill of peace will not be sustained to restrain a party from bringing his action of ejectment, until complainant's right has been *satisfactorily* established at Law. *Bond, Murdock et. al. vs. Little.* 10 Ga. 395
33. A warrant and survey of land and payment of the price, gives to the purchaser a *legal* right of entry, sufficient to maintain ejectment. *Winter vs. Jones.* 10 Ga..... 190
34. Where the State had no title to the thing granted, or where the Governor had no authority to issue the grant, the fact appearing on its face, it is absolutely void, and may be impeached collaterally, in a Court of Law, in an action of ejectment. *Ibid.*

See *Corporation*, I. 7; *Limitation of Actions*.

ELECTION.

1. When a testator bequeaths a slave (belonging to his son, A,) to his sons B and C, and in the same will gives to his son A a legacy of \$500, A will be put to his election which he will take; and Equity will compel him, either to relinquish his claim to the slave, or the bequest under the will. *McGinnis vs. McGinnis*. 1 *Kelly*.....501-'10
2. It is sufficient to raise a case of election, that the testator disposes of property not his own. *Ibid*.
3. The doctrine of election does not apply to residuary legatees as such. The same individual, however, may be both a specific and a residuary legatee. *Ibid*.
4. There is no time prescribed within which either party shall claim the right of putting the other party to elect. Each case must depend upon its own circumstances. *Ibid*.
5. When the recusant legatee will be required to refund the legacy, or restore the property retained by him. *Ibid*.
6. If A makes two propositions to buy goods of B, one in writing, the other in parol, B has the right to elect, which he will accept; and if he accept the written one, the writing is the only evidence of the contract. *Woolbright vs. Sneed*. 5 *Ga*..... 167
7. If the letter contains alternative propositions, the vendor has the right to elect, and an issue may be made before the Jury, as to which he did elect. *Ibid*.
8. A sells a tract of land to B, taking his notes for the purchase money, and giving his bond for titles when the purchase money is paid; A receives one-half the purchase money, when B sells the land to C, executing his deed with a warranty of title; C buying *bona fide* for value, without notice that the legal title is in A. After the sale to C, and with knowledge of that fact on the part of A, A and B enter into a verbal agreement that in payment of the balance of the purchase money due from B to A, B shall take up a note made by A to D, by substituting his own therefor, with A as his security; and that if A is compelled to pay the debt thus made by B to D, as surety, then the purchase money due from B to A, on the original sale of the land, shall be again considered as due, and A shall hold the legal title to the land as security for its payment. A pays the surety debt to D, and sues for and recovers the land from C; B dies, and the administra-

tor of B files his bill, asking direction of Chancery as to the distribution of the assets among the creditors; A and C are both made parties to the bill and answer. A claims to be paid his purchase money; C claims to be paid his damages for the breach of the covenant of warranty: *Held*, that the substitution by B of his note in lieu of A's note to D, is a payment of the purchase money due by B to A. And if the verbal agreement is considered as of force, then, in Equity, A is not entitled to be paid out of the assets of B, his purchase money; and further, that A having *elected* to rescind his original contract with B, by resorting to his legal title, and evicting C, by which the estate of B is made chargeable upon his warranty to C, A is to be held to his election, and shall refund to the estate of B, the amount of the purchase money which he has received, with interest. *Davis et al. vs. Smith et al.* 5 Ga..... 274

9. If a testator has affected to dispose of property which is not his own, and has given a benefit to a person, to whom that property belongs, the devisee or legatee accepting the benefit so given to him, must make good the testator's attempted disposition. For the doctrine of election is, he who accepts a benefit under a deed or will, must adopt the whole contents of the instrument. *Miller et al. vs. Cotton et al.* 5 Ga..... 341
10. Where defendants, indicted jointly, sever on their trial, it is the privilege of the State's counsel, to elect which shall be tried first; and where issue is joined on a plea of *Autrefois Acquit* by one defendant, before he announces himself ready for trial on the merits, and that issue is disposed of, this does not amount to an election by the State, and the other defendant may be placed first on his trial. *Studstill vs. The State.* 7 Ga..... 2
11. In order to put the widow to her election, between the provisions made in her favor by the will of the testator, and her legal right to dower in his estate, such testamentary provision in her favor, must be declared in express terms, to be given in lieu of dower, or the intention of the testator to that effect, must be deduced, by clear and manifest implication, from the will, founded on the fact that the claim of dower would be inconsistent with the will, or so repugnant to its provisions as necessarily to disturb and defeat them. *Tooke et al. vs. Mason et ux. et al.* 7 Ga..... 20
12. To constitute an equitable bar to the widow's claim of dower, by her acts and acquiescence in the provisions of the will for her benefit, so as to raise the presumption that she had made her election to accept such testamentary provisions in lieu of dower, it must be shown that she was cognizant of her rights and acted understandingly. *Ibid.*

EMANCIPATION. See *Slaves, &c.*

EQUITY.

I. JURISDICTION.

- (a) GENERAL PRINCIPLES.
- (b) ACCOUNT.
- (c) FRAUD AND MISTAKE.
- (d) SPECIFIC PERFORMANCE.
- (e) REFORMATION AND RESCISSION OF CONTRACT.
- (f) TRUSTS AND TRUSTEES.
- (h) DEBTOR AND CREDITOR; AND HEREIN OF "CREDITOR'S BILLS," AND
"MARSHALLING OF ASSETS."
- (i) OTHER CASES.

II. INJUNCTION: GRANTING AND DISSOLUTION.

III. PLEADING.

- (a) GENERALLY.
- (b) BILLS.
- (c) DEMURRERS: PLEAS AND ANSWERS.
- (d) BILLS OF REVIEW; OF PEACE; OF INTERPLEADER.
- (e) MULTIFARIOUSNESS.

IV. EVIDENCE.

V. DECREES.

VI. PRACTICE: AND HEREIN OF AMENDMENTS.

VII. LACHES AND WAIVER.

AS TO WIFE'S EQUITY, see *Husband and Wife*, II.

I. JURISDICTION.

(a) GENERAL PRINCIPLES.

1. The powers of the "Superior Courts" of Georgia, as Courts of Equity, are co-extensive with those of a Court of Chancery in England. *Balton vs. Flournoy. R. M. Charl.*..... 125
2. Is a Jury required by law, in a Chancery case in Georgia? *Quere. Ibid.*
3. The Judge of the Superior Court, acting as Chancellor, has the power to appoint a Master in Chancery, *pro hac vice. Ibid.*
4. When the process of Court is attempted to be used oppressively, and against justice—as by levying an execution, after judgment had been satisfied—the Court will grant relief, *upon motion. Watts & Joyner vs. Norton. R. M. Charl.*..... 353
5. And if it requires information of matters of fact, it will cause an issue to be made for that purpose. *Ibid.*
6. And where the movant was not prepared with his proofs, and modi-

fied his motion by asking for a rule on the plaintiff, to show cause at the next term, the Court granted the motion, but without stay of proceedings. *Ibid.*

7. A Court of Equity, under such circumstances, is the proper tribunal to grant relief. *Ibid.*
8. The equity the Court affords a person entitled to real estate by devise, to have the incumbrances on it discharged as a debt out of the personal estate, goes no farther than as between the heir or devisee of the estate and the residuary legatee; it cannot interfere with the disposition of other parts, as specific or general legacies, much less with the interest of creditors. *McLelland et al. vs. Wallace et al. Dudley....* 128
9. Where a party has two funds liable to his claim, a person holding an interest in one only, has a right in Equity to compel the former to resort to the other, if that is necessary for the satisfaction of both; but this rule has no application, in a question of right between two different sets of heirs, to one excluded from the real estate by being an alien, but interested in the personal, and a creditor pursuing his lien upon the real estate. *Ibid.*
10. An order to arrest property upon a threat of its removal from the State, until the defendants give bond, is illegal; such a procedure is not warranted by precedent or law. *Crewes et al. Ex'rs, vs. Davie et al. Ga. Decisions, part I.....* 66
11. A Court of Chancery will not relieve against an ignorance of law. *Ferguson et. al. vs. Ferguson et al. Ga. Decisions, part I.....* 138
12. Where a complainant is entitled to any part of the relief prayed for, the bill is not demurrable. *Hollsclaw, Adm'r. &c. vs. Johnson, Guar. &c. Ga. Decisions, part II.....* 146
13. A writ of *ne exeat* will not be granted in favor of a person having no legal right to sue. *Reed, Guardian, &c. vs. Wood et al. Ga. Decisions, part II.....* 174
14. Where the guardian of a deceased minor has wasted his estate, and is about removing from the State, the next of kin may have a *quia timet*, to secure themselves. *Ibid.*
15. After a verdict at Law, a party cannot, by original bill, obtain relief, which he might have had pending the action. *Donaldson vs. Kendall et al. Georgia Decisions, part II.....* 227
16. The question of jurisdiction must be tried in the Court where it arises. *Stiles vs. Knapp et al. Georgia Decisions, part II.....* 36

17. It may be raised, at any stage of the proceedings, if the defendant is not in laches. *Ibid.*
18. To oust the jurisdiction of Equity, a party's remedy at Law must be adequate, complete and suitable. *Habersham & Son vs. Bond et al. Ga. Decisions, part II.*..... 46
19. A plea to the jurisdiction is a personal right, and available only by the defendant. *Briscoe vs. Brewer. Ga. Decisions, part II.*..... 105
20. A Court of Equity will not set-off a claim not subsisting at the commencement of an action at Law, against the judgment when rendered, even if the plaintiff at Law is insolvent. *Bemis vs. Simpson. Ga. Decisions, part II.*..... 224
21. A Court of Equity will decree a defendant to account for money over-paid upon a usurious contract. *McLaren vs. Steapp. 1 Kelly*... 377
22. In the distribution of a fund raised by the sale of the effects of an insolvent bank, amongst the bill-holders, it is clear equity that the bill-holders should respectively receive only in proportion to the *quantum* of consideration paid for the bills. *Collins vs. The Central Bank et al. 1 Kelly*..... 460
23. Where a party comes into a Court of Equity to ask its assistance to interfere with the legal administration of the assets in the hands of the executor or administrator, he should at least state a clear *prima facie* case on his part, to justify such interference. *Mills et al. vs. Lumpkin, Adm'r. 1 Kelly*..... 513-'14
24. A party having elected to proceed at Law, Equity will not interpose until he has pushed his remedy to every available extent; neither will a Court of Chancery anticipate that the legal redress may not prove effectual. *McGough & Crews vs. The Insurance Bank and McDougald. 2 Kelly*..... 153
25. The Garnishment Acts of this State may not, either in express terms or by fair implication, have ousted Chancery of its previous jurisdiction over the same subject-matter; still, if a bill were filed, it would be demurrable, upon the ground that there was an ample remedy at Law, unless there was something peculiar in the circumstances of the case. *Ibid.*..... 154
26. A Court of Equity will not grant relief against a judgment at Law, on the ground of its being unconscientious, unless the defendant in the judgment was entirely ignorant of his defence pending the suit, or unless, without any default or neglect on his part, he was prevented by fraud, or accident, or the act of the opposite party, from availing

- himself of his defence, or by some *unavoidable* necessity. *Stroup vs. Sullivan & Black.* 2 *Kelly*..... 279
27. The Act of 1821, declaring that suits in favor of a guardian shall not abate upon the revocation of his letters of guardianship, but that the removal being suggested of record, a *scire facias* may issue to make the successor a party, at any time after qualification and appointment, does not take from Chancery the right of appointing a guardian *ad litem*, to prosecute a suit already commenced in behalf of an infant, provided no appointment has been made by the Ordinary. *Leonard vs. Scarborough and Wife.* 2 *Kelly*..... 76
28. In Georgia, the powers of the Chancellor are vested in the Judge and Jury. *Hargraves and another vs. Lewis.* 3 *Kelly*..... 168
29. In a contract to pay money, in which it is expressly stipulated, that the instalments shall be paid at *specified times*, and that if one instalment is not promptly met, the whole sum shall be due and payable, time is of the essence of the contract, and if the party agreeing to pay, fails to do so, he is not entitled to relief in Equity. *Sneed and another vs. Wiggins and another.* 3 *Kelly*..... 98
30. Where the Superior Court, in an Equity cause, has jurisdiction over the defendants resident in a different County from that in which the suit is brought. *Merchant's Bank vs. Davis.* 3 *Kelly*..... 115
31. When Equity will not interfere to enforce a lien created by Statute. *Coleman vs. Freeman et al.* 3 *Kelly*..... 139
32. In Georgia, the Jury and the Judge constitute the Chancellor. *Hargraves et al. vs. Lewis.* 3 *Kelly*..... 168
33. Courts of Equity will be extremely cautious in the exercise of their acknowledged jurisdiction, to grant relief against judgments at Law. *Pearce & Co. vs. Chastain.* 3 *Kelly*..... 229
34. Where the subject matter of defence was not, and could not by due diligence, be known to the defendant upon the trial, it will furnish ground for the interposition of a Court of Equity. *Ibid.*
35. A dies intestate, leaving a widow and four children, his only heirs and next of kin. B, one of the sons, upon coming of age, takes possession of the property, and manages the same for the benefit of all concerned; advancing to the distributees money and property, for their maintenance and settlement as they marry or come of age. The heirs being all of age, submit the division and settlement of the estate to arbitrators, who make an award which is acquiesced in and executed. Subsequently administration is taken out, and a bill filed

against B, to recover the assets: *Held*, that the submission and award could not be set up as a defence to the original bill; and that the defendant could get relief only by a cross bill against the administrator and his co-heirs. *Turk vs. Turk et al.* 3 *Kelly*..... 424

36. A Court of Equity will not compel the husband to reduce his wife's choses in action into possession, so as to defeat the wife's right of survivorship thereto. *Sayre vs. Flournoy, Adm'r, et al.* 3 *Kelly*..... 546

37. Equity cases are not embraced in the term "civil cases," as used in section 1, article 3, of the Constitution of 1798. *Gilbert vs. Thomas et al.* 3 *Kelly*..... 578

38. The creditors of D. G. deceased, filed their bill in the Superior Court of Hancock County, against R, as *administrator de bonis non, cum testamento annexo* of said deceased; R had none of the assets of the estate in his hands, neither was there any allegation of *non-feasance* or *mal-feasance*. H, the removed executor, and F. G. both of the County of Stewart, were made co-defendants, and were charged to have colluded together for the purpose of defrauding the estate, while under the management of said executor: *Held*, that the bill was properly demurrable for want of privity between the parties, and also, on account of the misjoinder of the defendants. *Ibid*..... 581

39. Where a judgment creditor comes into a Court of Equity and asks its assistance to have appropriated to the payment of his debt against the husband, property to which the husband may be entitled in the right of his wife, under the will of her grandfather, in the hands of trustees appointed by the testator, adequate provision must first be made for the support and maintenance of the wife and children, if any. *Napier et al. vs. Howard.* 3 *Kelly*..... 204

40. What will be considered adequate provision for that purpose, must depend on the circumstances of the case, and the condition of the parties. The Court ought to be liberal, and may appropriate the whole, or part, of the property, for the benefit of the wife and children, as it may deem equitable and just. *Ibid*..... 205

41. A bill filed for relief and discovery, in aid of a suit at Law, is demurrable, unless the complainant avers his inability to prove the facts upon which he relies at Law, without resort to the conscience of the defendant, or show some other ground of equitable interference with the Common Law jurisdiction. *Merchant's Bank vs. Davis.* 3 *Kelly*.. 117

42. To give jurisdiction to Equity, on a bill for the specific delivery of slaves, some other equitable circumstances must be alleged, besides the fact of the title in complainant. *Dudley vs. Mallory.* 4 *Ga*..... 52

43. In Equity, a surety who has paid off the debt of his principal, is subrogated to *all* the rights and remedies of the creditor. *Lumpkin vs. Mills.* 4 Ga..... 343
44. The conflicting authorities reviewed and commented on. *Ibid.*
45. The Superior Courts of Georgia have general Equity jurisdiction, where there is no adequate Common Law remedy. *Beall vs. Ex'rs of Fox.* 4 Ga..... 404
46. They have inherent jurisdiction to carry out the charitable intentions of a testator, independent of the Statute of 43d Elizabeth. *Ibid.*
47. Proceedings in Equity must commence in a County, where, on account of the residence of one of the defendants, or some other cause, the Court has jurisdiction. *Rice, Receiver, vs. Tarver et al.* 4 Ga.... 571
48. The Superior Courts in this State have power and authority to grant new trials in Equity causes. *Nell vs. Snowden.* 5 Ga..... 1
49. If a complainant chooses to examine a defendant, who is *primarily* liable, he can obtain no decree against him, nor against his co-defendant, who is only secondarily liable. *Ragan & Key vs. Echols.* 5 Ga. 71
50. To justify the specific execution of a parol agreement, its terms and conditions should be precisely stated. If the contract which is sought to be performed, is vague and uncertain, or the evidence does not support it, Equity will not enforce it. *Miller et al. vs. Cotton et al.* 5 Ga..... 341
51. Where a purchaser of a tract of land, at Sheriff's sale, refuses to comply with the terms of sale, and the same was re-sold for less money, a Court of Equity will not entertain a bill for specific performance of the sale, at the instance of the defendant, but will leave him to the remedy provided by the Act of 1831. *Orr vs. Brown et al.* 5 Ga..... 400
52. When a contract which is illegal, or opposed to public policy, has been executed in whole, or in part, and the parties are *in pari delicto*, neither a Court of Law nor of Equity, will interpose to give relief to either party, but will leave the parties where they find them. *Adams vs. Barrett.* 5 Ga..... 404
53. There is no Statute Law of Georgia which authorizes citizens of a foreign State to be made parties to proceedings in our Courts, without their consent, and to conclude them by a judgment *in personam*. *Dearing vs. The Bank of Charleston.* 5 Ga..... 497

54. The Act of 5 George II. held to be of force in Georgia in its spirit : that Act applies to citizens of the State, who abscond or depart from the State to avoid the service or process, or citizens of a foreign State, who having been in the State, depart therefrom for the same purpose. *Ibid.*
55. The Courts of this State have no extra territorial jurisdiction, and cannot make the citizens of foreign States amenable to their process, or conclude them by a judgment *in personam*, without their consent. A judgment *in personam* rendered against an inhabitant of a foreign State, although notice was served upon him, by publication, under the second Rule in Equity: *Held*, to be a nullity as to him. *Ibid.*
56. In a suit in Chancery against a citizen of this State, who has been duly served, and also against an inhabitant of a foreign State, a decree rendered therein: *Held*, to be conclusive as between the complainant and the citizen of this State, and that it is a complete protection to such citizen, and the decree in such a suit cannot be enjoined by such foreign citizen, on the simple fact of non-residence. *Ibid.*
57. A construction put upon the second Rule in Equity authorizing service to be perfected by publication in certain cases. *Ibid.*
58. Courts of Equity have jurisdiction to order a new trial in a Common Law Court, after judgment, on a proper case made; but it is a jurisdiction which should be exercised with great caution and circumspection. *Booth and another vs. Stamper.* 6 Ga..... 172
59. Marriage articles will be executed in favor of all persons coming within the scope of the marriage consideration, and at their instance, but not at the instance of mere volunteers. *Merritt et al. vs. Scott and Beall, Adm'rs, &c.* 6 Ga..... 563
60. Those having natural claims upon the parties, such as the wife and offspring, and those claiming under and through them, alone come within the scope of the marriage consideration. *Ibid.*
61. The fact that collaterals are first mentoined in the limitations of the articles, does not bring them within the reach and influence of the agreement. *Ibid.*
62. Where a Court of Equity executes articles in favor of persons within the scope of the marriage consideration, it will, at the same time, execute them also as to volunteers, it being the rule of Chancery to do nothing by halves. *Ibid.*
63. Where, upon application to a Court of Equity, the marriage articles are executed partially, viz: in behalf of one of the settlers, with-

out being executed as to the volunteers: *Held*, that upon a subsequent application to a Court of Equity, at the instance of the volunteers, the former decree cannot be invoked in their favor. *Ibid.*

64. An examination into the relative powers and province of the Court and Jury, in Equity causes, under the Constitution and laws of Georgia. *Hargrave vs. Lewis.* 7 Ga..... 110
65. To confer Equity jurisdiction in this State, should not the bill, in every case, show a Common Law remedy to be inadequate? *Quere. Powers et al. vs. Carey, Receiver.* 7 Ga..... 206
66. Where a Court of Equity acquires jurisdiction of a cause for one purpose, it will retain it, generally, to grant relief to which the complainant is entitled, although the party may have a remedy at Law. *Mays et al. vs. Taylor.* 7 Ga..... 238
67. The mere existence of cross demands, will not be sufficient to justify a set off in Equity. A debtor to a bank for borrowed money, cannot set-off against his note, or a judgment recovered thereon, the dividend that will be coming to him as a stockholder in the company, when its affairs are wound up. A set-off is ordinarily allowed in Equity, only when the party seeking the benefit of it, can show some equitable ground for being protected against his adversary's demand. *The Ruckersville Bank et al. vs. Hemphill et al.* 7 Ga..... 396
68. Where a *bona fide* purchaser, for a valuable consideration, without notice, is concerned, Equity will not interfere to grant relief in favor of a party having the legal title; for where the equities are equal, a Court of Equity will not interfere between the parties. And such a purchaser has as high a claim to protection and assistance, as any other person can have. *Papot vs. Gibson.* 7 Ga..... 533
69. Sale of land under an outstanding incumbrance against the vendor, is an eviction in judgment of Law, and the vendee is entitled to have the contract rescinded, and the notes given in payment cancelled. *Martin vs. Atkinson.* 7 Ga..... 228
70. The Judge of the Superior Court in Georgia, sitting as a Chancellor, has the power, exclusively, to administer the law. It is the province of the Jury to find the facts, and render a decree upon the trial, on the merits, and in that point of view only, may they be considered in the light of Chancellors. *Williams vs. McIntyre, Adm'r.* 8 Ga..... 35
71. A writ of *ne exeat* may be granted in this State, prior to any decree for alimony. The Court, in marking the writ, will exercise sound discretion, under the circumstances, so as to prevent oppression and extortion. *McGehee vs. McGehee.* 13 Ga..... 295

72. Where any person is arrested by virtue of a writ of *ne exeat*, he may be discharged on giving bond, with good and sufficient security, either that he will not depart the State, or will pay the eventual condemnation money, or by showing that the writ ought not to have been granted. *Ibid.*
73. It is competent for Courts of Chancery to appoint a Receiver, to institute suits in his own name, for the recovery of assets belonging to the suitors in Equity, and such Receiver is subrogated to all the rights of the real parties in interest. *Hardwick vs. Hook, Receiver.*
8 Ga..... 354
74. Where the tenant for life, in certain slaves, intermarried, and her husband sold ten of them, and then combining with the purchasers to defraud the remainder-men, the slaves are removed beyond the limits of the State, and re-sold: *Held*, that in such a case, Equity would compel the husband and purchasers, on a bill *quia timet*, to give bond in a sufficient penalty, with security, for the delivery of the negroes, at the termination of the life estate, and that altogether regardless of their solvency or insolvency. *Riddle et al. vs. Kellum et al.*
8 Ga..... 374
75. It is not enough that there was a remedy at Law, to make the judgment at Law a bar. It must be shown, not only that the matter alleged in the bill might have been set up by way of defence, but that it would have been as practical and efficient to the ends of justice and its prompt administration, as the remedy in Equity. *Hollingshead, Adm'r, vs. McKenzie.* 8 Ga..... 457
76. By making a proper case in Equity, a vendee will be entitled to recover the value of the beneficial and permanent improvements upon the premises. *Bryant vs. Hambric.* 9 Ga..... 133
77. A conveyance of property, to prevent the lien of expected judgments from attaching, is illegal, and the party so transferring his property will not be aided by a Court of Equity in reclaiming it. *Galt vs. Jackson.* 9 Ga..... 151
78. A Court of Equity does not, as of course, assume jurisdiction in taking executions upon judgments at Law, into its own hands, as such power would be oppressive, both to the debtor and the Court. *The Macon and Western R. R. Co. vs. Parker.* 9 Ga..... 377
79. The presumption is, that a Court that renders a judgment is competent to enforce it, and it is only in special cases that Chancery interferes. *Ibid.*
80. A complainant who participates in an act in violation of the laws

of the land, is not entitled to relief in Equity against the consequences of such act. *Ibid.*

81. The powers of Equity will be invoked to aid the defects of the Law, and where the facts and circumstances of the case are novel and peculiar, analogous principles will be applied to the existing emergencies. *Ibid.*
82. By the Act of 1820, in all cases where, by the 53d section of the Judiciary Act of 1799, the Superior Courts have Equity powers, the party may institute his suit on the Common Law side of the Court, if he can establish his claim without resorting to the conscience of the defendant. *The Justices, &c. use of Davis vs. Hemphill. 9 Ga.....* 65
83. Although Courts of Equity have concurrent jurisdiction with Courts of Law, in cases of partition, as a general proposition, yet in this State, if the party has an ample and adequate remedy according to the provisions of our Statute, a Court of Equity will not assume jurisdiction. But when it appears from the case made, that there is any obstacle in the way, so as to render the remedy at Law less ample and adequate, a Court of Equity will maintain its jurisdiction to remove such obstacles, and grant adequate relief. *Boggs, Adm'r, &c. vs. Chambers et al. 9 Ga.....* 1
84. Where B obtained a judgment against W for \$1,200, and subsequently thereto, W purchased judgments against B, for \$1,334, and filed a bill to have the latter judgments set-off against, and in satisfaction of the former: *Held*, that under the Act of 1799, it should affirmatively appear that there were no other judgment liens upon the defendant's property, before the Court of Equity would decree satisfaction of a particular judgment, and that complainant had an ample and adequate remedy at Law. *Wellborn vs. Bonner. 9 Ga.....* 82
85. The Judge of the Superior Courts in this State, is clothed with the same powers as to interlocutory orders and provisional proceedings in Equity, as are usually exercised by the Chancellor in England, until the cause is set down for trial on the merits. *Jones vs. Dougherty. 10 Ga.....* 273
86. Chancery jurisdiction is conferred in this State upon the Superior Courts, and not upon the Judges thereof. *Arrington vs. Cherry. 10 Ga.....* 429
87. In general, a Court of Equity is the tribunal best adapted to try the validity of a grant. *Winter vs. Jones. 10 Ga.....* 190
88. The power to grant temporary alimony, does not belong to a Court of Chancery in this State. *McGee vs. McGee. 10 Ga.....* 477

89. A judgment at Law cannot be impeached collaterally in a Court of Equity. *Redwine vs. Brown et al.* 10 Ga..... 311

(b) ACCOUNT.

1. In all cases of account, where the remedy of the plaintiff would not be as adequate and complete in a Court of Law, as in a Court of Equity, either from defect of proof, or other impediment, or for the purpose of avoiding a multiplicity of suits, the jurisdiction of the latter Court attaches. *McLaren vs. Steapp.* 1 *Kelly*.....377-38
2. It is not necessary that a bill for an account should contain an offer by the complainant to pay the balance, if found against him. *Wells et al. vs. Strange.* 5 Ga..... 22
3. Where a testator, by his will, directs a sale of his real and personal estate, for the payment of his debts, and after payment thereof, the residue of his estate to be equally divided between his wife and children, the children to receive their shares as they successively attain the age of *twenty-one* years: *Held*, that the legacies of the children vested in possession on their arriving at the age of twenty-one years respectively, and that the executor was liable to account therefor, notwithstanding there was no allegation in the bill that the debts had been paid, as it was charged a sufficient time had elapsed for that purpose, and that the sales of the testator's property had not been accounted for by the executor. *Womack vs. Greenwood.* 6 Ga..... 299
4. The failure of a guardian to make returns to the Ordinary, as required by law, will cast such a suspicion upon the fairness of a settlement made with his ward, as will avoid a plea of a final receipt in bar of an account. *Briers vs. Hackney and Wife.* 6 Ga..... 419
5. Bill for an account by client against an attorney, should be dismissed on demurrer, if an account can be fairly taken in a Court of Common Law, and suitable relief had; there being no discovery sought or required, or allegation in the bill to show the peculiar remedial process or functions of a Court of Equity to be necessary. *Powers and another vs. Cray, Receiver, &c.* 7 Ga..... 206
6. A bill against the representatives of a deceased administrator, setting forth his accounts, making no allegation of fraud or mistake, will be sustained, to allow a recovery for interest, if any due, upon the accounts, and also for commissions illegally retained. *Akin et al. vs. Hill et al.* 7 Ga..... 573
7. Where C. had been appointed assignee of a bank, for the purpose of collecting the assets for the benefit of the creditors, and after the expira-

tion of six years, to a bill filed against him for a discovery and account, he filed a *plea in bar*, that the affairs of the bank were greatly embarrassed by various law suits, and that he had expended more money than he had collected, &c.: *Held*, that this plea was no bar to the discovery and account sought. *Green vs. Carey, Assignee.* 10 Ga. 226

(c) FRAUD AND MISTAKE.

1. The equitable powers of the Superior Courts of Georgia, in suppressing frauds, will be exercised in aid of a mortgagor, seeking to be relieved from a usurious contract, notwithstanding that the Judiciary Act points out a method by which he may, at Common Law, dispute the sum due. *Winn vs. Ham & Mara. R. M. Charl.*..... 70
2. The fact that fraud has been committed, will not, *per se*, entitle complainants to redress in a Court of Equity, if a plain and adequate remedy at Law can be afforded them. *Commissioners of Brunswick vs. Dart. R. M. Charl.*..... 497
3. For case where Equity will relieve against mistake in an agreement, either as to fact or law, see *Rogers vs. Atkinson et al.* 1 *Kelly*, 23-27. *Collier, Adm'r, vs. Lanier.* 1 *Kelly*..... 239-'40
4. In cases of fraud, (with the exception of fraud in obtaining a will,) Courts of Equity and Courts of Law have concurrent jurisdiction, and the Court which first acquires jurisdiction, is entitled to retain it. *Trippe et al. vs. Lowe, Adm'r, et al.* 2 *Kelly*..... 305
5. Where a bill was filed by judgment creditors, to set aside a conveyance as fraudulent, it was *Held*, a Court of Equity had jurisdiction, notwithstanding the creditors might have sued the donee, as executor *de son tort*, after the death of the donor. *Ibid.*
6. In cases of frauds, Courts of Law and Courts of Equity have concurrent jurisdiction. The first of said Courts acquiring jurisdiction in such cases, is entitled to retain it. *Trippe et al. vs. Lowe, Adm'r, et al.* 2 *Kelly*..... 305
7. Where a suit is instituted at Law, and the defendant suffers a judgment by default, and the plaintiff continues his cause for three terms, and at the fifth, takes his judgment, the defendant at no time having filed any plea or answer: *Held*, that these acts do not constitute a fraud, so as to authorize the interference of a Court of Equity. *Bellamy & Co. vs. Woodson.* 4 Ga..... 175
8. The defendant's ignorance that the suit was pending, is no ground for Chancery to interfere. *Ibid.*

9. Though a trust in land need not be created in writing, yet, to take the case out of the Statute of Frauds, it must be proved by writing, and parol testimony is inadmissible for the purpose. *Miller et al. vs. Cotton et al.* 5 Ga..... 341
10. Whenever a case of fraud is made by the bill, parol evidence will be admitted, for the purpose of establishing that case; but the facts alleging the fraud, must be plainly, fully and distinctly set forth. *Ibid.*
11. Even in cases of fraud, parol evidence is not regarded with favor, and the Court will not act upon it, if it be not strong and irrefragable; particularly where there has been long acquiescence on the part of the complainants. *Ibid.*
12. Where there is a clear mistake, or other good cause for amending a sworn answer, the practice is, to file a supplemental answer. *Martin vs. Atkinson.* 5 Ga..... 390
13. Where a bill seeks to set aside a Sheriff's sale, on the ground of fraud by the purchaser, and to enjoin the Sheriff from making a title to him, some *specific fraudulent act* on the part of the purchaser, must be charged. A general allegation of fraud will not be sufficient. *Orr vs. Brown et al.* 5 Ga..... 400
14. The holder of a promissory note, who transfers it by delivery, for a valuable consideration, warrants by implication, unless otherwise agreed between the parties, that he is the lawful holder, and has a just and valid title to the instrument and a right to transfer it by delivery. He also warrants, in like manner, that the instrument is genuine and not forged or fictitious, and that he has *no knowledge* of any facts which prove the instrument, if originally valid, to be worthless, either by the failure of the maker, or by its being already paid, or otherwise to have become void or defunct; and any *concealment* of these facts on the part of the transferrer of the note, operates as a *fraud* on the rights of the transferee, for which a Court of Equity will entertain jurisdiction to compel discovery and grant relief. *Winter vs. Bullock.* 6 Ga. 230
15. If one in treaty with another for the sale of property, misrepresents a material fact, stating it to be true, when, at the same time, he knows it to be false, and the other party trusts to the statement, and acts upon it, this is a positive fraud, for which Equity will rescind the contract. *Smith et al. vs. Mitchell.* 6 Ga..... 458
16. Such a fraud may be perpetrated by acts as well as by words, and by any artifices designed to mislead, as well as by representation. *Ibid.*

17. Whether a party thus misrepresenting a fact, knows it to be false or not, is immaterial, for the affirmation of what one does not know to be true, or believe to be true, is equally, in morals and in law, as unjustifiable as the affirmation of what is known to be positively false. It is a fraud, on account of which Equity will rescind the contract, and re-instate the parties in their original rights. *Ibid.*
18. If a party thus affirming a fact, *believes* it to be true, when it is false, it is a fraud in Law, for which Equity will rescind the contract. *Ibid.*
19. And if a party innocently, by mistake, misrepresents a fact which is material, and to which the other party trusts, it is a cause for rescinding the contract, because it operates as a surprise and an imposition upon him. *Ibid.*
20. Where lands have been obtained by fraud in the grantee, upon a parol assurance that he would convey them, in a particular manner, to third persons, not parties to the contract, the *grantor*, or *his heirs at law*, are the proper parties to seek redress for the fraud, in a Court of Equity. *Robson, Adm'r vs. Harwell, and Wife. By LUMPKIN, J. 6 Ga.*..... 589
21. Where a recovery is sought on the ground of the fraud of the grantee, in obtaining a conveyance of lands, the recovery can extend only to the property so fraudulently obtained, and *mesne* profits for the use of the same. *By LUMPKIN, J. Ibid.*
22. Creditors and *bona fide* purchasers may attack a judgment for fraud, wherever it interferes with their rights, either at Law or in Equity. *Hammock vs. McBride. 6 Ga.*..... 178
23. Relief can be had against a deed or contract in writing, founded in mistake or fraud. *Trout vs. Goodman. 7 Ga.*..... 884
24. The mistake may be shown by parol proof of the declarations of the vendor, made subsequent to the sale. *Ibid.*
25. Relief will be granted, in all cases, to the injured party, whether he sets up the mistake affirmatively by bill or as a defence. *Ibid.*
26. Where C. and J. obtained the legal title to land, as security for a small sum advanced to W. under peculiar circumstances, the sum advanced not being one-fourth the alleged value of the land, promising to re-convey to W. on the re-payment of the sum advanced, with interest, but who fraudulently conveyed the land to a *bona fide* purchaser: *Held*, on a demurrer to the bill, insisting on the Statute of Frauds as a bar, that the demurrer should be overruled; that the Statute was intended to *prevent fraud* and not to protect it; that in such cases, a

- Court of Equity would take hold of the conscience of the defendants, and hold them as trustees for the benefit of the party defrauded. *Cameron et al. vs. Ward.* 8 Ga..... 245
27. Where a creditor receives a deed to a tract of land, as collateral security for the payment of a note which is to be given at a future time, and the creditor dies before the note is given, and the consideration of the deed thus entirely fails, it would be fraudulent in the administrator of the creditor to retain the deed, and Equity will order the instrument to be delivered up to be cancelled. *Hollingshead, Adm'r, vs. McKenzie.* 8 Ga..... 457
28. In Courts of Equity, the Statute of Limitations does not begin to run, in cases of fraud, until the discovery of the fraud. *Stocks et al. vs. Leonard et al.* 8 Ga..... 511
29. No one can maintain an action for a wrong done, where he has consented or contributed to the act which occasions the loss. Hence, if a complainant seeks to recover for an act of defendant, which he charges to be fraudulent, it is not a fraud against him, if it was done in pursuance of an agreement between himself and the defendant. *Peacock vs. Terry.* 9 Ga..... 137
30. If one in treaty with another for the sale of property, misrepresents a material fact, stating it to be true, when at the time he knows it to be false, and the other party trusts to the statement, and acts upon it, it is a positive fraud, for which Equity will rescind the contract. *Reese vs. Wyman et al.* 9 Ga..... 430
31. Such a fraud may be perpetrated by acts as well as by words, and by any artifices designed to mislead. *Ibid.*..... 430
32. Whether a party thus misrepresenting a fact, knows it to be true or not, is wholly immaterial. *Ibid.*
33. Where the party affirming, believes it to be true, it is not a fraud in fact, but a fraud in law. *Ibid.*
34. And if a party innocently, by mistake, misrepresents a fact which is material, and to which the other party trusts, it is cause for rescinding the contract; because it operates as a surprise upon him. *Ibid.*
35. The judgment of a Court having jurisdiction, may be set aside by a decree in Chancery, for fraud or accident, or the act of the adverse party, unmixed with negligence or fault in the complainant. *Mobley et al. vs. Mobley, Adm'r, &c.* 9 Ga..... 247
36. Upon a proceeding instituted before the Court of Ordinary, to reverse a judgment discharging an administrator, it is competent to

prove a fraud upon the Court in procuring the judgment of discharge, by proof of representations by the administrator, upon which the Court acted, that he had fully and faithfully settled the estate and executed his trust, and by proof of acts which falsify those representations. *Ibid.*

(d) SPECIFIC PERFORMANCE.

1. To justify the specific performance of a parol agreement, its terms and conditions should be precisely stated. If the contract which is sought to be performed, is vague and uncertain, or the evidence does not support it, Equity will not enforce it. *Miller et al. vs. Cotton et al.* 5 Ga..... 341
2. When a purchaser of a tract of land, at Sheriff's sale, refuses to comply with the terms of sale, and the same was re-sold for less money, a Court of Equity will not entertain a bill for specific performance of the sale, at the instance of the defendant, but will leave him to the remedy provided by the Act of 1831. *Orr vs. Brown et al.* 5 Ga..... 400
3. Whenever there has been a *part performance* of a parol agreement for the conveyance of lands, within the Statute of Frauds, a *part execution* of the *substance* of the agreement, acts done, unequivocally referring to and resulting from the agreement, and such that the party in whose favor the agreement was made, would suffer an *injury* amounting to *fraud*, by the *refusal* of the other party to execute it, a Court of Equity will, in such cases, decree a specific performance of the agreement. *Robson, &c. Adm'r, vs. Harwell and Wife.* By WARNER, J. 6 Ga,... 589
4. A parol agreement to convey lands, set up by a Court of Equity, has equal validity with a deed containing a covenant to convey; for it is a principle in Equity, that what is agreed to be done for a valuable consideration, is considered as done. *Ibid.* By WARNER, J.
5. Where a bill is filed for specific performance of an agreement, and the defendant has put it out of his power to perform, by a sale of the property, the Court will decree compensation, by way of damages. *Ibid.* By WARNER, J.
6. The mere existence of cross demands, will not be sufficient to justify a set off in Equity. A debtor to a bank for borrowed money, cannot set-off against his note, or a judgment recovered thereon, the dividend that will be coming to him as a stockholder in the company, when its affairs are wound up. A set-off is ordinarily allowed in Equity, only when the party seeking the benefit of it, can show some equitable ground for being protected against his adversary's demand. *The Ruckersville Bank et al. vs. Hemphill et al.* 7 Ga..... 396

7. It is otherwise if there be an express agreement to set-off the debts against each other, *pro tanto*. In such a case, a Court of Equity would enforce a specific performance of the stipulation, although at Common Law the party might be remediless. *Ibid.*
8. If a bill is filed to enforce a parol agreement respecting lands, and the defendant, in his answer, admits the contract, without insisting on the Statute of Frauds, the Court will decree a specific performance, on the ground that the defendant has renounced the benefit of the Statute: *aliter*, if he insists upon the Statute in his answer. *Hollingshead, Adm'r, vs. McKenzie.* 8 Ga..... 457
9. Equity will enforce a parol agreement for the sale of land, against a subsequent purchaser, with notice, when the first purchaser is in possession, and has made substantial improvements. *Maynor vs. Godwin.* Ga. Decisions, part II..... 205

(e) REFORMATION AND RESCISSION OF CONTRACT.

1. Equity will not relieve before eviction, by rescinding a contract, for the purchase of lands, on the ground of a defective title. It may be that the outstanding title may never be urged. *Roberts et al. vs. Woolbright.* Ga. Dec. part I..... 98
2. A complainant coming into Chancery to ask it to rescind a contract for the sale of land, must show that he has used ordinary diligence in investigating the title. *Ibid.*
3. Equity has jurisdiction to direct the cancellation of deeds and other instruments, which are *functus officio*, by payment or other cause, but will exercise it only in its sound discretion, in cases where the defence at Law is not adequate, by reason of loss of testimony, lapse of time, or something peculiar to the case. *Kenan et al. vs. Miller.* 2 Kelly.. 420
4. A Court of Equity will retain a bill, at the instance of the vendee of lands, to rescind the contract, notwithstanding he had not been evicted from the possession of the premises, nor had abandoned the possession thereof, nor had offered to do so. *Coffee et al. vs. Newsom, Ex'r.* 2 Kelly..... 460
5. When there has been a fraudulent representation by a vendor, as to his title to a body of lands, and the vendee seeks a rescission on that ground, the defect of title must be so great as to render the settlement of lands contracted for, unfit for the use intended. That portion to which the vendor cannot make title, must constitute the main inducement to the purchase. *Ibid.*
6. A Court of Equity will not decree the cancellation of conveyances,

- where anything has been received, until re-payment is made. *Miller et al. vs. Cotton et al.* 5 Ga..... 341
7. Where a bill was filed to rescind a contract for the sale of land by the vendee, on the ground that the title is encumbered with a judgment lien, the vendee having a deed with covenants of warranty: *Held*, that the allegation that the vendor resided without the State, and had no property therein, was sufficient to retain the bill. *Clark et al. vs. Cleghorn.* 6 Ga..... 220
8. Relief can be had against a deed, or contract in writing, founded in mistake or fraud. *Trent vs. Goodman.* 6 Ga..... 384
9. The mistake may be shown by parol proof of the declarations of the vendor, made subsequent to the sale. *Ibid.*
10. The power of rectifying and reforming written contracts, on the ground of mistake, constitutes a distinct branch of Equity jurisdiction, though it is one which Courts of Chancery will exercise very sparingly, and upon the clearest and most satisfactory proof only, as to the intention of the parties. *Ibid.*
11. If it be evident that both parties were mistaken in a material point, as to the true boundary or lines of the survey, a Court of Equity will grant relief to the buyer. *Ibid.*
12. Inadequacy of price, as a general proposition, will not, *per se*, be a sufficient ground to set aside a conveyance; yet that, taken in connection with other circumstances of a suspicious nature, may afford such a presumption of fraud, as will authorize the Court to set it aside. *Wormack vs. Rogers and another, Adm'rs.* 9 Ga..... 60
13. Chancery will exercise the power of reforming a written contract sparingly and with great caution, and only upon the clearest proof of the intention of the parties and of the accident or mistake upon which the jurisdiction is invoked. *Reese vs. Wyman et al.* 9 Ga..... 430
14. Chancery will reform a written contract, upon proof that the writing does not exhibit the contract as it was agreed upon by the parties at the time, and that the parts omitted were omitted by accident, mistake, inadvertence or fraud. *Ibid.*

(f) TRUSTS AND TRUSTEES.

1. Where the bill alleged that complainant had performed medical services for negroes belonging to an estate, on the faith of such estate, and at the instance of the executor thereof, who had since died insolvent: *Held*, that in Equity, such creditor had a right to resort to the

- estate, in the hands of the administrator *de bonis non*, for payment. *Habersham vs. Huguenin et al. R. M. Charl.*..... 376
2. A Court of Chancery, on sufficient grounds being shown, will remove a trustee under a marriage settlement, and appoint a new one. *Ex-parte Gale et ux. R. M. Charl.*..... 109
 3. If the original trustees are dead, the fact that the representative of one is temporarily absent, and the representative of the other is unwilling to act, is not, *per se*, sufficient to justify the substitution of new trustees. The Court has power to compel such representatives to assume the trust. *Ibid.*
 4. But the Court may, with the assent of all parties, substitute new trustees. *Ibid.*
 5. But to justify the removal of such representatives, as trustees, their refusal or incapability must be shown, either by answer to the petition for substitution, by affidavits of petitioners, or neglect of representatives to shew cause on proper citation. *Ibid.*
 6. Property, wrongfully purchased with the trust fund, may, at the option of the *cestui que trust*, be pursued in the hands of the trustee, or those in privity with him, and be held subject to the terms of the original trust. *Martin et al. vs. Greer et al. Ga. Decisions, part I.*.... 109
 7. An express trust, against which the Statute of Limitations does not run, may be created by parol. *Ibid.*
 8. The possession of the executors of a trustee, is the continuation of the trustee's possession, and the Statute does not run in their favor. *Ibid.*
 9. A security of an administrator, to whom a note is transferred, that was given for part of intestate's estate, is a trustee *quod hoc* for creditors and distributees. *Carnes et al. vs. Jones et al. Ga. Decisions, part I.*..... 170
 10. If a note be sued to payment by the security, in his own name, he is still a trustee, and it is no ground of objection that the action of law was not defended. *Ibid.*
 11. It is not a ground of objection to a decree in favor of distributees, that there may be creditors having a higher claim. *Ibid.*
 12. Where R. conveys to W. a tract of land, in consideration that W. will put upon it twenty negroes, and will, at his death, convey these negroes and their increase to M. and W. enters into possession of the land: *Held*, that this is a trust of personalty, created by W. and de-

- clared in favor of M. which a Court of Chancery will execute in favor of M. against the representatives of W. *Robson, Adm'r, vs. Harwell and Wife.* 6 Ga..... 589
13. The case of *Miller et al. vs. Cotton et al.* reviewed and affirmed. *Ibid.*
14. In a bill filed by a *cestui que trust* to execute a parol trust of lands, no evidence by parol is admissible; nor can a decree be rendered in favor of the complainant, unless the charge of fraud is distinctly made. It cannot be considered as inferentially made, by a statement of the parol agreement, which declares the trust, and a failure to execute it. *Ibid.*
15. Where, by a deed of trust, the sum of \$15,000 was raised by the voluntary contributions of certain residuary legatees, and vested in a trustee, subject to certain trusts, one of which was, that the sum of \$5,000, and no more, should be appropriated for the payment of the debts of the *cestui que trust*, then owing, the said trustee to judge of the justness of the debts which might be presented for payment, and of the order and proportion in which the same should be paid: *Held*, on a bill being filed by the *cestui que trust*, alleging that all his debts had been paid by the trustee, and that there remained in his hands the sum of \$3,000 of the \$5,000 placed there for the payment of his debts, that the *cestui que trust* was entitled to an account from the trustee therefor, and to have the same invested for his benefit. *Napier vs. Napier.* 6 Ga. 404
16. Trusts intended by the Courts of Equity not to be reached by the Statutes of Limitation, are those technical, continuing trusts, which are not at all cognizable at Law, but fall within the proper, peculiar and exclusive jurisdiction of Courts of Chancery. *Thomas vs. Brinsfield.* 7 Ga..... 154
17. Courts of Equity have jurisdiction to compel trustees to account for the trust funds in their hands, especially where the accounts are complicated, and from the facts alleged in the bill it appears, affirmatively, a discovery from the defendant is necessary to obtain a decree. *Keaton vs. Greenwood.* 8 Ga..... 97
18. The right of a creditor to force a stockholder to pay his unpaid subscription for stock, in an insolvent bank, is a case of purely technical and direct trust, to which the Statute of Limitations does not apply. *Hightower vs. Thornton.* 8 Ga..... 486
19. If a party is to be constituted a trustee, by the decree of a Court of Equity, on the ground of *fraud*, his possession is *adverse* from the time the circumstances of the fraud were discovered. *Harrison vs. Adcock et al.* 3 Ga..... 68
20. The Statute of Limitations does not begin to run against express

- trusts created by the act of the parties or the appointment of law, so long as the trust continues, and is acknowledged to be a *continuing, subsisting* trust, for the reason that the possession of the trustee is the possession of the *cestui que trust*; but when the trust is denied by the trustee, and he claims to hold the trust funds or trust property as his own, adversely to his *cestui que trust*, the latter having knowledge of that fact, the Statute will begin to run in favor of such express trustee from the time of such adverse claim or possession. *Keaton vs. Greenwood*. 8 Ga..... 97
21. The Statute of Limitations will begin to run in cases of *implied trusts*, created by decree of a Court of Equity, in favor of the trustee, from the time of his possession, as it would do in a Court of Law; for the reason, that his possession never was the possession of the alleged *cestui que trust*. The relation of trustee and *cestui que trust* never, in fact exists, until the decree of the Court establishing that relation. *Ibid*.
22. Although the Statute of Limitations applies to constructive trusts, yet, it is not available where the legal remedy has not been barred. The Statute does not begin to run in favor of a trust estate against a debt contracted by an agent thereof, until a return of *nulla bona* against the agent, or his insolvency be legally ascertained. The practice of exhausting the legal remedy against such agent before proceeding in Equity against the trust estate, is in furtherance of justice. *Wylly et al. vs. Collins & Co*. 9 Ga..... 223
23. A Judge at Chambers has no power, upon petition,² to order a sale of trust property. *Arrington vs. Cherry*. 10 Ga..... 429
24. In order to raise a trust, by the promise or agreement of a party, which a Court of Equity will execute, it must be founded on some *meritorious* or some *valuable* consideration. *Yarborough et al. vs. West*. 10 Ga..... 471
25. If a trust fund is in danger of being wasted or misapplied, a Court of Equity will interfere at the instance of any one interested, and by the appointment of a Receiver, or in some other way, grant relief. *Jones vs. Dougherty*. 10 Ga..... 273
26. If the trustee omits to act when required by duty to do so, or is wanting in necessary care and diligence in the due execution of the trust, a Court of Equity will interfere. *Ibid*.

(h) DEBTOR AND CREDITOR: AND HEREIN OF "CREDITOR'S BILLS," AND
"MARSHALLING OF ASSETS."

- 1 A creditor at large, or one whose debt has not been carried to judg-

- ment, cannot call upon a Court of Equity, to afford its aid in setting aside conveyances alleged to be voluntary and fraudulent, made by the supposed debtor, of his property. *McDermot vs. Blois et al.* *R. M. Charl.*..... 281
2. A creditor is not compelled to join the legatees in a suit in Equity, brought against the executor of the debtor; it is his privilege, not his duty, to join them. The executor is to sustain the person of the testator, and to defend the estate from creditors and legatees. *Maxwell vs. Maxwell.* *R. M. Charl.*..... 462
3. And the fact that the estate has been distributed, and is in possession of the legatees, does not vary the rule. *Ibid.*
4. A creditor having established his claim and obtained a decree against the estate of his debtor, authorizing a levy upon said estate, in whosoever hands it might be, will not be enjoined, at the instance of specific legatees, from proceeding against that portion of the estate in their hands, on the ground that the testator had set apart a particular portion of his estate for the payment of his debts; creditors having superior claims to volunteers, cannot be embarrassed or retarded by such a provision. *Ibid.*
5. In Equity, the payment by, or the release and discharge of one joint debtor, will not operate as a discharge of the debt as to all, unless the intention of the parties and the justice of the case requires such a construction of the payment. *Norris vs. Ham et al.* *R. M. Charl.*.... 267
6. A vendor of real estate is not obliged to obtain judgment and a return on his execution, before applying to a Court of Equity, to obtain from an administrator an account of the personal estate of the intestate, and a decree of payment in case of assets, or otherwise a lien upon the land sold. *Harden et al. vs. Miller's Adm'x.* *Dudley*..... 121
7. A charge in a creditor's bill, that he fears that his debtor, if he gets possession of funds which he is proceeding to collect under execution, will apply them to the payment of other liens having no priority over his own, will not justify the interposition of a Court of Chancery. He must state the ground of his fears, or allege some issuable fact, such as a fraudulent combination between his debtor and other creditors, to entitle him to relief. *McGough et al. vs. Insurance Bank and McDougald.* 2 *Kelly*..... 153
8. Creditors claiming to be subrogated to the husband's rights, as against the property of the wife, have no other rights than the husband who is their debtor, against such property. *Sayre vs. Flournoy et al.* 3 *Kelly*..... 551

9. What is the proper remedy of creditors against the trust estate of their debtors, when the legal title is not in the trustee? *Blake vs. Irwin*. 3 *Kelly*..... 366
10. General rule, as to creditor's bill, stated. *Thurmond et al. vs. Reese*. 3 *Kelly*..... 452
11. Creditor may file bill to set aside fraudulent conveyance. *Ibid.*
12. General rule, as to the right of the creditor to come into Equity to obtain satisfaction out of the equitable estate of his debtor. *Ibid.*
13. Creditor may file his bill at once to set aside fraudulent conveyances. *Ibid.*
14. A Court of Equity will aid a judgment creditor who has pursued his legal remedies, to every available extent, to reach a distributive share of an estate to which an insolvent debtor is entitled in his own, in the hands of an administrator, held *in trust* for such judgment debtor. *Sayre vs. Flournoy, Adm'r, et al.* 3 *Kelly*..... 546
15. When a judgment creditor seeks the aid of a Court of Equity, to reach the *equitable* assets of his debtor, not the subject-matter of levy and sale, he must show he has pursued his legal remedies to every available extent; but a Court of Equity will lend its aid to remove an obstruction fraudulently interposed, to prevent the property of the defendant from being made subject to the judgment lien, without a return of *nulla bona* on the execution. *Stephens vs. Beall*. 4 *Ga.*.... 319
16. A judgment creditor does not acquire a specific lien upon the equitable estate of his debtor, by the return of an execution unsatisfied, but by the commencement of a suit in Equity, after the execution has been so returned. *Blake vs. Bigelow et al.* 5 *Ga.*..... 427
17. If A holds a demand against B & C as partners, and C is dead, and there are effects of the firm in the hands of B, the surviving partner, sufficient to pay the debt, and D holds property conveyed to him by C, to indemnify him as surety for C; *upon the equities subsisting between* B and C, Chancery will compel A to proceed against the property in the hands of B, the surviving partner, so as to leave the property conveyed to D, to be applied to his remuneration as surety for C. *Newsom et al. vs. McLendon et al.* 6 *Ga.*..... 392
18. A being insolvent and largely indebted to B, conveys certain property to C, to be held for his, A's use, and that of his family, and delivers possession. Afterwards, he agrees with B, in consideration of a full discharge, to turn over to him all his property, real and personal, and all his rights of property. In pursuance of this agreement, A turns

over to B all his property, except that conveyed to C, and B executes to him a full release: *Held*, that the agreement between A and B is a contract of sale, and that the title to all A's estate vested in B, including the property conveyed to C: *Held*, that the conveyance to C is a mere nullity, and so to be regarded, when in any Court it comes in conflict with the rights of creditors; and also, that the judgment creditors of B—he being also insolvent, and a return of "*nulla bona*" on their executions—may, in a Court of Equity, by decree, apply the property so conveyed to C, in payment of their judgments, together with the rents, issues and profits thereof. *Woodard et al. vs. Solomon and another, Ex'rs.* 7 Ga..... 246

19. A creditor may, in Equity, follow the assets of his debtor into the hands of a distributee, whether real or personal, and the Statute of Limitations will not give the distributee a title which will defeat the creditor's claim, but the creditor must sue upon his claim, within the statutory term applicable to it; if he does not, he will be barred, unless there is a reply to the Statute which will prevent its operation. *Caldwell vs. Montgomery and Wife.* 8 Ga..... 106
20. For the purpose of marshalling the assets of an insolvent estate, the executor or administrator may file his bill and obtain a decree, not only for reducing the property into money, but also of ascertaining the order in which the debts are to be paid. *The Macon & Western R. Co. vs. Parker.* 9 Ga..... 377
21. The rule that the joint estate is to discharge the joint debts in the first place, and the separate estate the separate debts, and that neither can invade the funds of the other, until the particular class of debts is satisfied out of it, considered and questioned. *Cleghorn vs. The Insurance Bank of Columbus.* 9 Ga..... 319
22. Even admitting the rule, as a principle of general Equity, it will not be enforced to the exclusion or postponement of the joint creditors, so long as they have recourse at Law against the separate estate. *Ibid.*
23. It is only when the legal recourse of the joint creditors against the separate estate is terminated, and they have no claim against those assets, except in Equity, as in case of the death, bankruptcy, (or perhaps statutory assignment in insolvency,) of a partner, that the joint creditors are postponed. *Ibid.*
24. Where goods have been purchased in the name of, and on the credit of one co-partnership firm, and turned over to another co-partnership firm, composed of some of the same individuals, without any *bona fide* or *valuable* consideration being paid therefor: *Held*, that the Court of Equity will aid the judgment creditors of the co-partnership making

- such transfer, to follow the goods into the hands of the transferees, and require them to account for such goods, or the proceeds of the sale thereof, and apply the same in satisfaction of their judgments. *Dennis et al. vs. Ray, Receiver, &c.* 9 Ga..... 449
25. A security is entitled to be relieved in Equity, against a creditor, who has extended indulgence to his principal, after judgment, for a valuable consideration. *McCary vs. Coley.* Ga. Decisions, part I.... 104
26. They have the same remedy on the bond that the distributees have. *Carnes vs. Jones et al.* Ga. Decisions, part I..... 170
27. Creditors and heirs, as a general rule, can only sue third persons, through the representative of the estate. The exception is, where there is collusion, insolvency, unwillingness to collect the assets when called on, or some other like special circumstance. *Worthy et al. vs. Johnson et al.* 8 Ga..... 236
28. If heirs elect to set aside purchases made by executors, administrators or guardians, at their own sales, they must go into Equity, and such sales are voidable only, and not, *per se*, void. *Ibid.*
29. The subscription for stock is a debt which the corporation may call in to satisfy the creditors. *Hightower vs. Thornton.* 8 Ga..... 486
30. A Court of Equity will provide a remedy to enable the creditors to appropriate this trust fund. *Ibid.*
31. The doctrine of Dr. Salmon's case, (1 *Cas. in Ch.* 204,) questioned. *Ibid.*
32. The equity of the creditor is equally strong, where the stockholder has contracted to pay (and failed to do so) his portion of the capital stock, as where it has been paid in, and afterwards withdrawn. *Ibid.*
33. Creditors of an insolvent corporation, whose charter has been forfeited, and who have exhausted their legal remedies against it, may sue in Chancery, for the assets of that corporation, and have them applied in payment of their debts. *Hightower et al. vs. Mustian.* 8 Ga 506
34. A bill by the creditors of an insolvent corporation, alleging a fraudulent combination and collusion between the assignee and debtor of the institution, to injure and defeat the creditors, makes a proper case for the interposition of a Court of Equity. *Stocks et al. vs. Leonard et al.* 8 Ga..... 511
35. A temporary or *ad interim* receiver may not only be appointed before answer, but even before the subpoena to appear and answer has

- been served, when it is shown that immense danger would ensue unless the property were taken under the care of the Court. *Jones vs. Dougherty*. 10 Ga..... 273
36. The affidavit of the party alone may be a sufficient verification of the facts, to authorize the appointment of a receiver. *Ibid.*
37. Creditor's bills may be entertained in Georgia, there being nothing in the Constitution or laws of this State repugnant to such proceedings. *Ibid.*
38. Assignments by debtors, for the benefit of creditors are, in a peculiar sense, the objects of Chancery jurisdiction. *Ibid.*
39. The remedy at Law is generally, in such cases, wholly inadequate as a measure of full relief. *Ibid.*
40. Where there is a trust fund in danger of being wasted or misapplied, a Court of Equity will interfere, upon the application of any of the creditors, either on his own behalf, or in behalf of himself and the other creditors, and by the appointment of a receiver, or in some other mode, grant relief. *Ibid.*
41. If the trustee omits to act, when required by duty to do so, or is wanting in necessary care and diligence in the due execution of the trust which he has undertaken, a Court of Equity will interfere. *Ibid.*
42. If a judgment creditor files his bill to enforce a trust executed by his debtor for the benefit of his creditors generally, it is a virtual waiver of his legal lien. *Ibid.*
43. Where the conveyance is made by the debtor directly to the creditors, the assent must be given at the time of the assignment; but if the assignment be to trustees for the use of creditors, the legal estate passes and vests in the trustees, and Chancery will compel the execution of the trust for their benefit. *Ibid.*
44. Where a party has an interest in the estate of an intestate, as a judgment creditor, and it appears that the administratrix, by fraud and collusion, is misapplying the assets of such estate in such manner as to *injure* such judgment creditor, a Court of Equity has jurisdiction to appoint a receiver to take charge of such assets; but before the Court will interfere with the due administration of the assets in the hands of an executor or administrator, a strong case must be made by the complainant; he must show that he has good reason to fear some future probable *injury*. *Dougherty vs. McDougald et al.* 10 Ga..... 121
45. What is known as a creditor's bill, will lie in Georgia. *Hardwick et al. vs. Thomas et al.* 10 Ga..... 266

46. Plaintiffs in *fi. fa.* cannot go into Equity until they have tried the remedy by garnishment, and found that inadequate. *Field et al. vs. Jones.* 10 *Ga.*..... 229

See "*Debtor and Creditor.*"

(i) OTHER CASES.

1. The doctrine of the equitable lien of vendor of land for unpaid purchase money, recognized, where no title had passed, and the intention of the parties to look to the property itself was manifest. *Marine & Fire Ins. B'k vs. Early et al. R. M. Charl.*..... 279
2. And where the title has passed, the lien will be preserved against purchasers by act of Law, as assignee of a bankrupt, and creditors claiming under a conveyance from vendee. *Ibid.*
3. Chancery will not restrain a judgment at Law, on the ground of irregularity, or want of jurisdiction in the Common Law Court. *Stiles vs. Knapp et al. Ga. Dec. part II.*..... 36
4. Equity will protect persons in the use, integrity, and value of the property, against waste or trespass, where Courts of Law cannot, because of the tardiness of the remedy, the peculiar nature of the property injured, the insolvency of the wrong doer, or the plaintiff's inability to prove his damages. *Moore vs. Ferrell et al. 1 Kelly*..... 10
5. But Equity will not intermeddle with the title of the property, the subject of the waste or trespass. *Ibid.*
6. If a complainant in Equity has been before a competent tribunal at Law, which has given judgment against him, that judgment, unless reversed, is conclusive upon him in the other forum, even as to matters of defence which he might have presented, but neglected to introduce at the proper time, and that too, notwithstanding the decision disallowing his plea was erroneous. *Kenan & Rockwell vs. Miller. 2 Kelly* 329
7. A Court of Equity will not relieve against a judgment creditor at Law, unless the defendant in the judgment can show he had good defence, of which he was entirely ignorant while the suit at Law was pending against him, or unless he was prevented from availing himself of his defence, by fraud or accident, or the act of the adverse party, *unmixed with negligence or fraud on his part.* *Robbins et al. vs. Mount, Adm'r, et al. 3 Kelly*..... 78
8. Where a party contracts to pay money by instalments, to be paid at *specified times*, and agrees that if he fail to meet promptly any one of the instalments, the whole sum shall be due and payable, and having

- failed to pay, the plaintiff is proceeding against him, for the whole, Equity will not relieve. *Sneed et al. vs. Wiggins et al.* 3 *Kelly*..... 98
9. To authorize a Court of Equity to relieve against a judgment at Law, there must be *fraud, surprise*, or some *extraordinary and uncontrollable* circumstances, where manifest injustice has been done. *Pearce & Co. vs. Chastain.* 3 *Kelly*..... 229
10. A decree in Equity is the proper remedy to enforce the vendor's lien for the unpaid purchase money of lands. *Mimms vs. Macon & Western R. R. Co.* 3 *Kelly*..... 344
11. Where the contractors on a railroad stipulated with the Company, to finish their work by a certain time, and the Company agreed to furnish the materials along the line; and it was further agreed, that all matters of difference arising under the contract, should be determined by the Engineer of the Company, without farther recourse or appeal: *Held*, that Equity had jurisdiction of a claim for *time lost* through the breach of the contract, on the part of the Company, notwithstanding the Engineer had refused to allow the claim—the bill charging that the Engineer was a stockholder to the amount of \$10,000, a fact unknown to the contractors at the time of the submission. *Milnor & Co. vs. Ga. R. R. Co.* 4 *Ga.*..... 385
12. Equity will interfere, to set aside a judgment rendered by a Court of competent jurisdiction, only in cases where the defendant has a good defence, of which he was entirely ignorant, or where he was prevented from making it, by fraud or accident, or the act of the other party, unmixed with negligence or fault on his part. *A. Bellamy & Co. vs. A. Woodson.* 4 *Ga.*..... 175
13. A judgment creditor, upon a usurious contract, comes into a Court of Equity, seeking to have his debt satisfied out of the money in the hands of the assignee, arising from the sale of the insolvent's property, upon which he had a lien at Law, which he waived, consenting to the sale, upon the assurance of the trustees, made in ignorance of the usury, that his claim should be paid: *Held*, that the usury may be set up by way of answer to the bill, provided a sufficient excuse be rendered, why the original debtor did not avail himself of this defence at Law; and if sustained by proof, the judgment shall be displaced for the usury, and only stand against the trust fund, for the principal and legal interest due on the original loan. *Nisbet vs. Walker.* 4 *Ga.*..... 221
14. An injunction will not be granted to restrain a *mere trespass*, without allegations of special facts, showing that a Court of Law cannot afford an adequate remedy. *Anthony vs. Brooks et al.* 5 *Ga.*..... 576

15. Before relief will be granted on the ground of inadequacy of price, the parties must be placed *in statu quo*. And on this account, the party seeking to set aside the contract, is driven necessarily into Equity, as the remedy at Common Law is not adequate to the exigencies of the case. *Robinson vs. Schly and Cooper.* 6 Ga..... 515
16. Where a plaintiff in *fi. fa.* residing in one County, directs a levy to be made on personal property of the defendant, residing in another County, and a levy is accordingly made by the Sheriff of the County of the defendant's residence, the fact of such levy *alone*, is not sufficient to give a Court of Equity jurisdiction of the person of the plaintiff, and compel him to litigate his rights in that County. *Mays and another vs. Taylor.* 6 Ga..... 238
17. Where a suit was pending on a note, between M and T & C, and T was about to file the plea of usury, and it was agreed between M and T, that if T would withdraw his plea of usury, and let judgment be rendered against T & C, that M would not collect the judgment out of T until he had exhausted all the property of C, and M failed to comply with his agreement: *Held*, that the *breach* of the agreement by M, was no ground for a Court of Equity to open and impeach the judgment, on the ground of usury in the note on which it was founded. *Ibid.*
18. When an administrator, upon the discharge of his first sureties, gave a new bond, and subsequently becomes insolvent: *Held*, that Equity will entertain jurisdiction of a bill against the administrator and both sets of sureties, praying a discovery of the amount of the devastavit, and the time when it occurred, in order to charge each set of sureties according to their respective liabilities on their bonds. *Alexander, Adm'r, vs. Mercer et al.* 6 Ga..... 549
19. It is not necessary, in order to sustain such a bill, to obtain, *first*, a judgment against the *principal*, it being competent for a Court of Equity so to mould its decree as to mete out ample justice and full protection to all parties, by rendering the assets of the estate first liable, the individual property of the administrator next, and the property of the sureties only *ultimately* liable. *Ibid.*
20. Such a bill will be more especially sustained, where it is alleged that a portion of the assets of the estate have been delivered up to the second set of sureties, to indemnify them from liability, the nature and value of which are unknown to the complainant, who sues as *administrator de bonis non* of the deceased. *Ibid.*
21. In a bill by the ward against the guardian, for settlement, alleging that he has wasted the estate; that his sureties have been discharged

by the Court of Ordinary ; that the waste occurred *before their discharge*, and that the complainants have no means of proving that fact, but by resort to the conscience of the defendant ; and a discovery and decree is asked, ascertaining and fixing the *time* of the waste, with a view to charge the sureties in a future action ; the discovery and decree allowed, but no opinion given as to the effect of that decree in a future suit against the sureties. *Woods vs. Woods.* 7 Ga..... 587

22. Where an infant has purchased a negro, and paid part of the purchase money, and gave his note for the balance, and took the negro into his possession ; and afterwards, to a suit instituted on the note by the vendor, he disaffirmed the contract, by a plea of infancy : *Held*, that inasmuch as the remedy of the vendor, under the peculiar facts of the case, to secure the possession of the negro at Law, was inadequate and difficult, a Court of Equity would entertain jurisdiction, and decree a sale of the negro, and out of the proceeds thereof, reimburse the infant the amount paid by him, and decree the balance to the vendor or his legal representative. *Strain vs. Wright.* 7 Ga..... 568

23. A sells land to B, and gets judgment on the notes given, for the purchase money, and levies on the land in the possession of C, who interposes a claim : *Held*, that upon the trial of this claim, it is not competent for A to set up his lien as a vendor, but that he is forced to go into Equity to assert it. *Colquitt vs. Thomas et al.* 8 Ga..... 258

24. Where there are sundry *ft. fas.* against an insolvent Railroad Company, threatening to seize and sell the road, with its equipments—extending one hundred miles in length, through six different Counties—Equity will take jurisdiction of the matter ; direct a sale of the entire property for the benefit of all concerned, and distribute the fund according to the practice and usage in Chancery, in a creditor's suit against executors and administrators. In such a case, no other Court but that of Chancery, possesses adequate jurisdiction to reach and dispose of the entire merits. *The Macon & Western R. R. Co. vs. Parker.* 9 Ga..... 377

25. To allow the road to be cut up into fragments, and separate portions sold at different sales, in the different Counties through which it passes, to different purchasers, would not only sacrifice the rights and interests of creditors, but defeat the objects and intentions of the Legislature in granting the charter. *Ibid.*

26. Any creditor who has a claim upon the fund, but who is not a nominal party to the suit, may make himself a party thereto in fact, by coming in and presenting his claim under the decree, and submitting himself to the jurisdiction of the Court, for its settlement and adjustment, upon the fund to be distributed. *Ibid.*

27. If he neglects or refuses to come in and entitle himself to the benefit of the decree, Equity will not assist him to set aside and annul the proceedings under it. *Ibid.*
28. A party who goes into Equity to seek relief against an usurious contract, who has paid principal and legal interest of the debt, must aver that fact in his bill; and if any remains unpaid, that he is ready and willing, and now offers to pay the balance. *Peacock vs. Terry.* 9 Ga..... 137
29. Demurrer sustained for want of equity, where it appeared by complainant's bill that they held the senior grants to the land in dispute, and that the junior grants, issued by the State of Georgia to defendants, were examinable collaterally at Law, the State having no title to lands thus granted, and such grants having issued contrary to the prohibition of a Statute. *Commissioners of Brunswick vs. Dart. R. M. Charl.*..... 497
30. Equity will not relieve an administrator after two judgments *de bonis testatoris* and *de bonis propriis* have been successively recovered against him. *Bostwick vs. Perkins, Hopkins & White* 1 Kelly...137-40
31. A purchaser of land who is in possession, cannot have relief in Equity against the payment of the purchase money, upon the mere ground of a defect of title before eviction. *McGehee et al. vs. Jones.* 10 Ga. 127
32. If he is in possession under a deed, with covenants of warranty, he must resort to his covenants; if under a bond for titles, he must resort to his bond. *Ibid.*
33. If however, the obligor is insolvent or without the jurisdiction of the Court, and there is no property within the jurisdiction, which would be liable to the satisfaction of his damages, and there is an outstanding title paramount to his, the purchaser will be entitled to relief against the payment of the purchase money, to the extent of his damages before eviction. *Ibid.*
34. The insolvency or non-residence must be distinctly alleged, and the defect of title, with every other fact necessary to enable the Court to decree on the title and assess the damages. *Ibid.*
35. It is only necessary for remainder-men and reversioners to state their case in the terms of the Act of 1830, in order to entitle them to the remedy therein provided; they need not specify in their bill the threatened wrong or probable ground of possible injury, to enable them to obtain the assistance of the Court to avert the peril. *Jackson & Lester vs. Waters, Adm'r of Anna Hackett, dec'd.* 10 Ga..... 546

36. The defendant, under the Act of 1830, may, by answering, controvert the title of the complainant, and if the decree of the Jury be against its validity, he will be released from his obligation for the forthcoming of the property; otherwise the security which he has given will continue. *Ibid.*
37. The Act of 1830, to preserve the rights of remainder-men and reversioners, contemplates that the bill should be filed and the security given in the County where the person resides, who has the possession or control of the property, and unless special cause exist, the jurisdiction cannot be transferred. *Ibid.*
38. The fact that different portions of the property claimed, are held in several Counties, is not sufficient, especially where the title is not the same, through which the respective owners derive their right. *Ibid.*
39. The fact that a party is interested in the decree, is a sufficient reason why he should be made a co-defendant to the bill, and he may be brought out of his County for this purpose. *Ibid.*
40. The principle stated upon which bills of peace are entertained. *Bond, Murdock et al. vs. Little.* 10 Ga..... 395
- See *Lien*, I. 3. II. *Passim*.

II. INJUNCTION: GRANTING AND DISSOLUTION.

1. On the application for an injunction, a Chancellor may go into the consideration of the merits, as disclosed in the bill, and which are intrinsic and dependent upon its express allegations and charges. *Winn vs. Ham and Mara.* R. M. Charl..... 70
2. Though a bond and mortgage have been assigned, if the bill alleges that such assignment was colorable, and that the assignee had notice of the usury pervading the original contract, in the absence of a specific refutation of such allegations, the Court will grant an injunction. *Ibid.*
3. If sufficient grounds are shown for an injunction, it may be granted, to restrain the proceedings of a Court of Common Law, at any stage of such proceedings. *Albritton vs. Bird.* R. M. Charl..... 93
4. An injunction will not be granted, if the person seeking it could, by proper vigilance, have protected himself from injury, by the ordinary means at Law. *Ibid.*
5. In general, an injunction will not be granted *ex parte*, and before answer. *Hartridge vs. Rockwell.* R. M. Charl..... 260

6. But in cases of great urgency, or where irreparable injury may ensue, as in waste, &c. where the application follows quickly after the injury complained of, the Court will grant the injunction without notice, or appearance, or subpoena served. *Ibid.*
7. And it will not be granted *ex parte*, and before answer, where it would deprive defendant of a *right*, for which no redress could be given, and where its refusal, though productive of possible injury to complainant, could not divest him of any right. *Ibid.*
8. Injunction granted to restrain the Sheriff from paying over money made on sale of an estate under executions issued by individual creditors thereof, where such injunction was prayed for by bill in the Superior Court, alleging that complainants had filed a bill in the Circuit Court of the United States for the district of Georgia, claiming a specific lien on said estate and preference over individual creditors, which claim was still pending and undetermined. *Read et al. vs. Dews et al. R. M. Charl.*..... 355
9. The Judges of the Superior Court of Georgia, have the power, in vacation, to dissolve an injunction. *Ibid.*..... 358
10. Under the rule of Court, which directs that all injunctions shall be granted, "until further order," an injunction may be dissolved before answer filed, on mere affidavit denying the equity of the bill *Ibid.*
11. An injunction will be dissolved on motion, when it appears to have been improvidently granted. *Ibid.*
12. Where the party has been prevented from availing himself of his legal defence by the irregularity of the commissioners nominated by himself to take testimony, or the misconduct of his attorney, he will not be entitled to an injunction. *Albritton vs. Bird. R. M. Charl.*... 93
13. An injunction will be granted, if the bill shows a *probable* right, and a probable danger to such right, without the special interposition of the Court. *Read et al. vs. Dews et al. R. M. Charl.*..... 358
14. Where it appears that the defendants have an established and legal right, which might be delayed and hindered unnecessarily, by retaining an injunction absolutely, it may be dissolved conditionally, and on terms which will protect both parties. *Ibid.*
15. Where a bill was filed merely for the purpose of obtaining injunction, and after it was granted, other persons really and beneficially interested in the judgment at Law enjoined, applied to be made defendants, the Court compelled the complainants (on pain of dissolution of the injunction if they refused) to amend their bill, by making the ap-

- plicants defendants and parties, without prejudice to the injunction. *Ibid.*
16. An injunction may be retained under the special circumstances of the case, though the defendant has filed his answer, fully denying the equity set up in the bill. *Shellman et al. vs. Scott. R. M. Charl....* 380
17. An injunction may issue to restrain trespass, where irreparable injury would follow its denial, as where defendant is insolvent. *Powers vs. Heery. R. M. Charl.....* 523
18. But *it seems*, it will not be granted, where the title is in dispute. *Ibid.*
19. And where the answer set forth that there was an actual adverse possession by defendant, at the time of the purchase of the land by complainant, the injunction was refused. *Ibid.*
20. The Act of December 16, 1811, in reference to injunctions, applies to all persons, in whatever capacity they apply for the writ. An executor or administrator cannot obtain the injunction, without giving bond and paying costs, as required by such Statute. *Habersham vs. Carter et al. R. M. Charl.....* 526
21. An injunction may be continued, in the discretion of the Court, after all the equity of the bill is denied in the answer. *Cornwise vs. Bonvyum. Ga. Decisions, part II.....* 15
22. Service of the *rule nisi*, upon the complainant's solicitor, stating the grounds of the application, and fixing the time and place of hearing the motion to dissolve an injunction on the coming in of the answer, is sufficient service. *Moore vs. Ferrell et al. 1 Kelly.....* 9
23. Where the answer plainly and distinctly denies the facts and circumstances upon which the equity of the bill is based, the injunction will be dissolved. *Ibid.*
24. Upon a motion to dissolve an injunction, the Court will look to such parts of the answer only as are responsive to the bill. *Ibid.*
25. What parts of an answer to a bill in Equity will be considered, upon a motion to dissolve an injunction, see *Moore vs. Ferrell et al. 1 Kelly.* 9
26. Injunction will be granted to stay trespass, when, from its nature, or the circumstances of the parties, the remedy, at Law, cannot be full and adequate. *Ibid.....* 10
27. An injunction will not be dissolved, upon the ground that the title

of the complainant is questioned by the answer; but when the title is denied, the Court will look more closely to the character of the trespass. *Ibid.*..... 11

28. An injunction will not be granted to stay a sale under an execution, on the ground that the judgment has been fully satisfied, inasmuch as the party has a prompt and adequate remedy at Law. It is otherwise when the bill charges that the payment has been made by the representatives of the principal defendant, or a third person, under a fraudulent combination to oppress the complainant, and that the facts attending the transaction, rest in the knowledge of the defendant alone, and can only be obtained by an appeal to their consciences. *Rogers vs Atkinson et al.* 1 *Kelly*..... 26-'7
29. In this State, a verdict for the defendant, in an Equity cause, on the first trial thereof, does not operate as a dissolution of the injunction granted therein, as a matter of course, when an appeal is entered from such verdict, in accordance with the provisions of the Act of 1843. *Neisler vs. Smith.* 2 *Kelly*..... 267
30. A verdict for the defendant in an Equity cause, does not operate as a dissolution of the injunction granted therein, as a matter of course, where an appeal is entered in accordance with the Act of 1843. *Ibid.*
31. A bill filed for injunction and discovery, and setting forth facts which entitled the complainant to relief in Equity, and praying for specific relief, is an original bill, and is not dismissed by an order, taken upon the coming in of the answer, that the injunction be dissolved and the answer be read upon the trial of the action at Law. *Curan vs. Colbert.* 3 *Kelly*..... 246
32. Injunction bills may be amended so as to insert additional facts relating to the same subject-matter or contract, which existed prior to filing the bill, by leave of the Court, without prejudice to the injunction. *Walker, Ex'r, vs. Walker.* 3 *Kelly*..... 309
33. Any one of the several complainants, in an injunction bill, may verify the statements in it by affidavit, so as to authorize the sanction of the Chancellor. *Hemphill et al. vs. Ruckersville Bank.* 3 *Kelly*... 443
34. It is a general rule of practice, in Courts of Equity, to dissolve an injunction, where the answer of the defendants had been filed, denying all the facts and circumstances upon which the equity of the complainant's bill is based. *Ibid.*..... 445
35. The Act of 1811, (*Prince*, 438,) which declares that "in all cases of injunctions, they shall be disposed of, and a decision made at the second term of said Court, held in and for said County, where such suit

- originated," means the second term after the parties are served, and the cause set down for trial. *Johnson et al. vs. Holt et al.* 3 *Kelly*.... 120
36. Where the answer of the defendant plainly and distinctly denies the facts and circumstances upon which the equity of the bill is based, as a general rule, the injunction will be dissolved. *Clark et al. vs. Oleg-horn.* 6 *Ga.*..... 220
37. An administrator may be made a party to an injunction bill, for the purpose of enjoining him from interfering with a legacy in the hands of an executor, to which his intestate had no title, before the expiration of twelve months from the date of his qualification; there being no claim made against him in the bill, for any matter or cause of action against his intestate in his lifetime. *Womack vs. Greenwood, Ex'r.* 6 *Ga.*..... 299
38. Where the bill to enjoin a trespass, together with the answer responsive thereto, show a lease in the defendant, older than complainant's title, the injunction will be dissolved upon motion, after the coming in of the answer. *Field vs. Hackney and Wife.* 6 *Ga.*..... 423
39. In applications to a Court of Equity, for an injunction to restrain a trespass, the bill must allege peculiar circumstances, to show that the injury is irreparable and the Common Law remedy insufficient. *Hatcher vs. Hampton.* 7 *Ga.*..... 49
40. The mere allegation that the defendant is felling the timber of the complainant, is not enough, without farther averment as to some peculiar value of the timber for some particular purpose. *Ibid.*
41. Chancery will interpose, by injunction, to avoid a multiplicity of suits, where there are sundry persons controverting the same right, and each standing upon his own pretensions; but it will not interfere to restrain a person, merely because he is guilty of a repetition of the same trespass, provided the case is abundantly susceptible of compensation in damages. *Ibid.*
42. An injunction will not be granted to restrain a mere trespass, susceptible of perfect pecuniary compensation, and for which the party may obtain adequate satisfaction in the ordinary course of law. *Bethune vs. Wilkins and another.* 8 *Ga.*..... 118
43. To authorize a Court of Equity to interfere in cases of trespass, there must be something particular or special in the case, for which a Court of Law cannot afford adequate redress. *Ibid.*
44. An allegation that the tenant will be homeless, for want of means to procure another habitation, will not authorize a Court of Equity to

restrain the officer, by injunction, from placing the purchaser at Sheriff's sale in possession of the premises. *Ibid.*

45. The Court will dissolve an injunction, on 'the coming in of the answer of the defendant, who alone is interested, negating all the facts and circumstances charged in the bill, and upon which its equity is based, though all the defendants have not answered. *Dennis vs. Green, Adm'r.* 8 Ga..... 197
46. So, if the deceased was a necessary party to the final decree to be rendered, but not interested in the injunction, a motion to dissolve the injunction need not be postponed until the representatives are made parties. *Dennis vs. Green, Adm'r.* 8 Ga..... 197
47. A denial in the answer, from information and belief, is not sufficient to dissolve an injunction. *Coffee et al. vs. Newsom, Ex'r.* 8 Ga.... 444
48. Where the equitable facts are not charged to be within the knowledge of the defendant, and he merely denies all knowledge and belief of them, the injunction will not be dissolved on the bill and answer alone. *Ibid.*
49. If the equity of the bill is not denied, either from ignorance or other cause, the injunction will not be dissolved. *Ibid.*
50. The answer of an executor, that he was not privy to the fraud charged against his testator, and that he did not believe the facts alleged in the bill against him, from his confidence in his integrity, is not sufficient to dissolve the injunction to restrain proceedings at Law, in favor of the estate. *Ibid.*
51. In particular cases, the Court will retain the injunction, though the answer fully denies the equity of the bill. *Ibid.*
52. A files his bill, charging that he is the owner of four shares in an estate represented by B; that he purchased property from a former representative of the estate, and gave his notes therefor, with an understanding that they should be paid, by allowing him the said shares; that judgment had been obtained on the notes, and praying an injunction of the judgment, and the execution of the agreement: *Held*, upon the answer distinctly denying that the estate owed the complainant anything, and stating that the four shares claimed in the bill had been paid to him, the injunction was properly dissolved. *Ford vs. Tyson, Adm'r.* 8 Ga..... 466
53. An injunction will be dissolved upon the coming in of the answer, fully denying the equity of the bill. *Jones vs. Joiner et al.* 8 Ga.... 562
54. On motion to dissolve an injunction upon coming in of answer, excep-

tions filed are no objection to the motion, unless they affect the answer in the parts relating to the grounds of the injunction. *Lewis vs. Leak et al.* 9 Ga..... 95

55. Where the answer of the defendant is not responsive to the bill, but sets up affirmative allegations, in opposition to, or in avoidance of the complainant's demands, the answer is of no avail in respect to such allegations, on a motion to dissolve an injunction, and if replied to, the defendant, on the trial, is as much bound to establish such allegations by independent proof, as the complainant is to sustain his bill. *Ibid.*
56. Although it is a general rule in Chancery practice, that on the coming in of the answer, plainly and distinctly denying all the facts and circumstances upon which the equity of the bill is based, that the Court will dissolve the injunction; yet in some particular cases, the Court will continue the injunction. The granting and continuing of the process must always rest in sound discretion, to be governed by the nature of the case. *Holt et al. vs. The Bank of Augusta.* 9 Ga. 552
57. *Held*, that under the charter of the Griffin and West Point Plank-road Company, and under the General Law, the Inferior Court of Pike County may rightfully institute suit in Equity, to restrain them from violations of their charter. *The Justices, &c. vs. The Griffin, &c. P. R. Co.* 9 Ga..... 475
58. Where B was about to erect a livery stable with a plank floor, upon a public street in a City, on his own land, within sixty-five feet of a public hotel, owned and kept by C, and C having applied for an injunction, alleging that the erection of the stable would cause irreparable injury to his property in said hotel, and result in the loss of health and comfort to himself and family, and in the loss of patronage to his hotel, in consequence of the unhealthy effluvia that would arise from the stable, the collection of swarms of flies, and the interminable stamping of horses therein: *Held*; that this would operate as a nuisance to complainant, and that he was entitled to the injunction. *Coker vs. Birge.* 9 Ga..... 425
59. A citizen cannot enjoin the opening of a public road over his enclosed lands, when it appears from his bill that he has not taken the steps pointed out by the law to procure the assessment of his damages. *Parham vs. The Justices, &c.* 9 Ga..... 341
60. Nor upon the ground that the reviewers appointed by the Court signed the petition for the road, and took an active interest in getting it up. *Ibid.*
61. Nor upon the ground that it does not appear from the return of the

reviewers, that they were not sworn according to the requirements of the Statute. *Ibid.*

62. When a party, liable over as transferrer to the transferee of a promissory note, is notified of a plea of failure of consideration, filed to a suit by the transferee thereon, the transferee is a privy in law to the judgment thereon, and is concluded thereby. And if afterwards, the transferrer is proceeding at Law to enforce securities against the transferee taken in payment for the note, Equity will relieve by injunction and decree. *Bullock vs. Winter.* 10 Ga..... 214
63. A livery stable in a City, erected within sixty-five feet of a hotel is, *prima facie*, a nuisance, and may be restrained by injunction. *Coker vs. Birge.* 10 Ga..... 336
64. The answer of the defendant, admitting the facts charged in the bill, as to the distance and relative situation of the stable from the tavern, but denying that the livery stable is a nuisance, is mere matter of opinion, and not sufficient to authorize the dissolution of the injunction, before the final hearing. *Ibid.*
65. Nor will the Court discharge the *ad interim* interdict, so far as to permit the experiment to be made, whether a livery stable could be erected and conducted in such a manner as not to be a nuisance. *Ibid.*
66. A Court of Equity will not interfere to restrain a trespass, by injunction, unless it be destructive to the very nature and substance of the estate, or unless irremediable mischief would ensue unless immediate relief was granted, or where, from the difficulty of the proof, or some other peculiar circumstance, this conservative remedy is imperatively demanded. *Catching vs. Terrell.* 10 Ga..... 576
67. The throwing down of fences and letting in cattle upon the growing crop does not authorize a Court of Equity to interfere—the injury being susceptible of perfect pecuniary compensation. *Ibid.*
68. The mere allegation by a complainant that the legal remedy is too tardy, or that irreparable mischief will ensue, is not sufficient; but to entitle the party to an injunction, the facts must be stated, to show that the apprehension of injury is well founded. *Ibid.*

See PARTNERS, IV. 10.

III. PLEADING.

(a) GENERALLY.

1. The references of a bill in Chancery, are a part thereof. Where a bill in Chancery, seeking an injunction, refers to another bill pending in same Court, in *pari materia*, and intimately connected with it, the Court may invoke the allegations of the latter bill, and answer thereto, in deciding upon the prayer of the former. *Bolton vs. Flournoy. R. M. Charl.*..... 125
2. To a bill for relief and injunction against plaintiffs in execution, issuing upon a Common Law judgment, their attorneys, against whom no fraud is charged nor relief sought, ought not to be made parties. *Kenan & Rockwell vs. Miller. 2 Kelly.*..... 328
3. When the proceeding was intended to set aside a transfer from the Bank of Macon to the Bank of Columbus, of a schedule of notes, suits on which were pending in other Counties, as well as in the County of Twiggs: *Held*, that the makers of the notes were properly made parties to the proceedings in Twiggs. *Rice, Receiver, vs. Tarver et al. 4 Ga.*..... 571
4. All persons interested in the decree to be rendered, should be made parties to the bill. *Wells et al. vs. Strange. 5 Ga.*..... 22
5. No persons are parties defendants to a bill, except such as are named as such, and against whom a subpoena is prayed. *Carey, Assignee, vs. Hillhouse. 5 Ga.*..... 251
6. Where a bill is filed by an executor, for the purpose of executing the trusts declared by the will, the *cestui que trusts* need not necessarily be made parties. *Beal et. ux vs. Crafton. 5 Ga.*..... 301
7. If the proper parties are not before the Court, and the Court cannot make a complete decree, without affecting their interests, the objection may be taken at the trial, and the bill will be dismissed. *Smith and Shorter vs. Mitchell. 6 Ga.*..... 458
8. The non-joinder of a party, who might be a proper party, but whose absence works no prejudice to the rights of those who are before the Court, is not a fatal objection to the Court's proceeding to a decree, and the bill will not be dismissed on that account at the hearing. *Ibid.*
9. In a bill filed to set aside an award, the defendant may rely upon the award without pleading it. *Tyler vs. Stephens et al. Adm'rs. 7 Ga..* 278

10. To a bill filed by executors, for direction in the execution of a will, and also asking to be protected against a contingent claim against the estate, set up by a third person, to certain property of the estate, through a title derived from others, and independent of the will, such third person is not a necessary party, and on demurrer, the bill, as to him, will be dismissed. *Bond et al. Ex'rs, vs. Conelly*. 8 Ga..... 302
11. On a motion to dismiss a bill for want of equity, the question, as to parties, does not legitimately arise. *Hightower vs. Thornton*. 8 Ga. 486. Also, *Hightower vs. Mustian*. 8 Ga..... 506
12. A bill defective for want of parties, must generally be demurred to specially, and the demurrer must show who are the proper parties. *Ibid*.
13. Where the complainant or defendant refers, in the bill or answer, to proceedings which have transpired in another cause, a complete copy of the record should be attached as an exhibit; otherwise, they cannot be used on the hearing. *Demere et al. vs. Scranton et al.* 8 Ga..... 43
14. Where a bill is dismissed on demurrer, for want of equity, and a second bill is filed, charging the same facts, and praying, substantially, the same relief, the judgment on demurrer may be pleaded in bar of the second bill. *Ferguson et al. vs. Carter et al.* 8 Ga..... 524
15. A complainant who relies for relief upon a tender, must allege all the facts substantially, which are necessary in pleading a tender at Law. *McGehee and another, Ex'rs, vs. Jones*. 10 Ga..... 127
16. In a bill by the holder of a bond for titles, filed in anticipation of eviction, for defect of title in vendor, the insolvency or non-residence of the vendor, must be distinctly alleged, and the defect of title, with every other fact necessary to enable the Court to decree on the title and assess the damage. *McGehee et al. vs. Jones*. 10 Ga..... 127
17. In a bill by a receiver of a bank, whose charter has been forfeited, to set aside an assignment of effects made by that bank, on the ground of fraud, it is not possible to make it a party, it being extinct. *Carey et al. vs. Giles, Receiver*. 10 Ga..... 9

(b) *BILLS*.

1. All persons materially interested in the subject-matter of the suit, must be made parties to a bill in Equity. *Footman et al. vs. Ex'rs of Pray. R. M. Charl*..... 291
2. But this rule is to be enforced under the discretion of the Court, and

is subject to exception and modification, according to the circumstances of the case. *Ibid.*

3. The common exception in favor of creditors and legatees, will not extend, unless under special circumstances, to residuary legatees or distributees, all of whom must be made parties. *Ibid.*
4. Where a bill seeks discovery and relief, only against the acts of one of the executors of an estate, it is not necessary to make the other executor a party in the first instance. *Ibid.*
5. But it seems that the co-executor may be made a party during the process of the suit, if it shall prove to be expedient or necessary. *Ibid.*
6. A mere witness ought not to be made a party to a suit in Chancery. *Ibid.*
7. What necessary to allege in creditor's bill.¹ *McGough & Crews vs. The Ins. B'k and McDougald.* 2 *Kelly*..... 154
8. Must aver complainant's inability to prove the facts upon which he relies at Law, without resort to the conscience of the defendant, or show some other ground of equitable interference with the Common Law jurisdiction. *Merchant's Bank vs. Davis.* 3 *Kelly*..... 117
9. Interrogatories in a bill cannot enlarge or contract the case made by the allegations in the bill; the defendant is bound to answer all material interrogatories, and if the answer would be of any use to the complainant, either to assist his equity or advance his claim to relief, the interrogatory is material. *Beall vs. Blake et al.* 10 *Ga.*..... 449
10. When a supplemental bill is filed, bringing new parties into Court, it is as to them a new suit, and is to be considered as being commenced when the supplemental bill is filed in office. *Morgan, Adm'r, vs. Morgan, Ex'r.* 10 *Ga.*..... 297

(c) DEMURRERS: PLEAS AND ANSWERS.

1. Where a defendant answers part of a bill, such answer will overrule a demurrer on the record, or *ore tenus*, going to the whole bill. *McDermot et al. vs. Blois et al.* R. M. Charl..... 281
2. If the cause assigned on the record, for demurrer, be bad or insufficient, other cause may be assigned *ore tenus*. *Ibid.*
3. *Quere.* If a bill charges combination, must a demurrer so far answer as to deny the charge? *Ibid.*

4. If a case is made out in which a Court of Equity gives relief, a demurrer cannot be sustained. *Morel vs. Houstoun. R. M. Charl.*..... 285
5. *Secus*, where the equity of plaintiff is not stated with sufficient certainty. *Ibid.*
6. Where, upon a bill for discovery and relief, the discovery sought will afford no ground for equitable relief, a demurrer to the relief is good to the discovery also. *Ibid.*
7. A demurrer to a bill in Equity cannot be sustained, on the allegation of mere matter of fact. *Redd, Guardian, &c. vs. Wood et al. Ga. Decisions, part II.*..... 174
8. Where there is a general demurrer to the whole bill, and the complainant is entitled to an answer to part, either as to the discovery or relief prayed, the demurrer will be overruled. *McLaren vs. Steapp. 1 Kelly.*..... 377-78
9. The answer of a defendant to a bill of discovery, must be full and perfect to all the material allegations in the bill. A general denial of the matters charged, is not sufficient; there must be an answer to the sifting inquiries upon the general subject; and whenever there are *particular* and *precise* charges, they must be answered *particularly* and *precisely*, and not in a general manner. *Walker, Ex'r, vs. Walker. 3 Kelly.*.... 308
10. A corporation aggregate may file an answer to a bill in Equity, under its corporate seal, but an injunction against a corporation will not be dissolved on the filing such an answer, unless the answer is duly verified by the oath of some of the corporators or agents who are acquainted with the facts stated therein. *Hemphill et al. vs. The Ruckersville Bank. 3 Kelly.*..... 444
11. The Statute of Limitations is a good defence, by way of demurrer, if the facts appear upon the face of the bill; if not, it must be made available by plea. In Equity, if the complainant be within any exception to the Statute, it is incumbent on him to state it in his bill. *Worthey et al. vs. Johnson et al. 8 Ga.*..... 236
12. In general, if a fact is charged in a bill, which is within the defendant's knowledge, as if it is done by himself, he must answer positively, and not according to his *remembrance or belief*. The rule is not invariable. *Carey, Assignee, vs. Jones. 8 Ga.*..... 516
13. An exception is where the fact charged has not occurred within six years. *Ibid.*
14. A defendant in his answer cannot charge himself with the receipt

- of goods, or the proceeds thereof, and also discharge himself, by alleging that he has accounted therefor. *Dennis et al. vs. Ray, Receiver.* 9 Ga..... 449
15. If the lapse of the period of limitations appear with certainty, on the face of the bill, and there is nothing stated to avoid it, the objection may be taken by demurrer. *Caldwell vs. Montgomery and Wife.* 8 Ga..... 106
16. As to effect of judgment on demurrer, to a bill of review. *Carey, Assignee vs. Giles, Receiver.* 10 Ga..... 9
17. In a bill filed by legatees against an executor, for an account of usurious interest, made upon the funds of the estate, he must answer as to the amount of money loaned; at what rate; when and with whom usurious contracts were made; how often renewed, and what profit he realized; appending an account of the whole to his answer, according to the best of his knowledge, information, remembrance and belief. *Beall, Ex'r, vs. Blake et al.* 10 Ga..... 449
18. When a defendant has in his power the means of acquiring the information necessary to enable him to make the discovery called for, he is bound to make use of such means, whatever pains or trouble it may cost him. *Ibid.*
19. When a plea to a bill in Chancery is adjudged a good defence in part, and ordered to stand for an answer, it is a sufficient answer to so much of the bill as it covers, unless by the order, liberty is given to the complainant to except. *Ibid.*
20. When a defendant consents to answer, or having pleaded is ordered to answer, he must answer fully. *Ibid.*
21. As to demurrer after amendment filed, see *Booth et al. vs. Stamper.* 10 Ga..... 109
22. Upon demurrer, the Court will not inquire into the regularity or competency of an amendment to the bill, previously allowed by the Court. *McGehee et al. vs. Jones.* 10 Ga..... 127

(d) BILLS OF REVIEW: OF PEACE: OF INTERPLEADER.

1. In a bill of interpleader, where there are two parties claiming of the complainant, the same demand, it is no objection that one has been carried to judgment. *Griggs vs. Thompson et al.* Ga. Dec. part I.... 146
2. The ground of equitable jurisdiction in such cases, is the doubtful titles of the defendants. *Ibid.*

3. Where a decree in Equity has been before the Supreme Court, on a writ of error, and the judgment of the Court below affirmed, a bill of review will not lie to reverse such decree, for error apparent on the face thereof. *Rice et al. vs. Carey, Assignee.* 4 Ga..... 558
4. When a decree is rendered in favor of A against B and C, B in a bill filed to review that decree, is entitled to make C a party complainant, without his authority and against his wishes. In such case, however, C is entitled to sever. *Hargraves vs. Lewis.* 6 Ga..... 207
5. Where a decree sought to be reviewed, appears on the record to have been entered upon a voluntary settlement of the parties, a bill of review will not lie, although the original decree be *irregular*. *Hargraves vs. Lewis.* 7 Ga..... 110
6. A bill of review will not be entertained where it would be unjust and unconscientious to disturb the *first* decree, or where the same result would inevitably take place on a re-hearing. *Ibid.*
7. What is the limitation to bills of review in this State? *Quere. Ibid.*
8. Under our present system, will bills of review lie for errors apparent upon the record? *Quere. Ibid.*
9. In ordinary cases, the effect of a judgment overruling a demurrer to a bill of review in Georgia is, to throw open the decree reviewed to a new hearing. If, however, the error in law sought to be reviewed goes to the denial of the complainant's right to maintain the original bill, then the judgment on demurrer is conclusive against him, and may be pleaded in bar, unless reversed. *Carey, Assignee, et al. vs. Giles, Receiver.* 10 Ga..... 9
10. Where a bill of peace was filed for the purpose of restraining a defendant from prosecuting his action of ejectment: *Held*, that the principle upon which a Court of Equity interferes and grants relief in such cases, is to suppress useless litigation, to prevent multiplicity of suits, to restrain oppressive litigation and to prevent irreparable mischief. *Bond, Murdock et al. vs. Little.* 10 Ga..... 395
11. A Court of Equity will not interfere until the complainant's right has been *satisfactorily* established at Law, nor in a *doubtful* case. *Ibid.*

(e) MULTIFARIOUSNESS.

1. Multifariousness defined. *Butler et al. vs. Durham.* 2 Kelly..... 419
2. A bill filed by the maker and sureties to certain promissory notes, which were given to an administrator for purchases at his sale, against

one into whose possession they were delivered by the payee, who had absconded, to indemnify him, and also one of the complainants, who were joint sureties on the administrator's bond, for losses sustained by them in that character—to have said notes cancelled, upon averments that they were paid before they were transferred, and that the defendant had instituted three suits upon them at Law, the first of which was dismissed, the second also dismissed, after plea and proof of payment, and the third still pending; and with the further averments that the defendant had been fully indemnified as surety on the bond, from other sources, with a demand that defendant answer the allegations, and a special prayer that said notes be delivered up to be cancelled, and a prayer for general relief, is a *single bill*, and not demurrable for multifariousness. *Ibid.*..... 418

3. A bill filed for a general account and settlement of a partnership, may embrace every object necessary to the final and complete adjustment of the concern, without being demurrable for multifariousness, *Wells and another vs. Strange.* 5 Ga..... 22
4. A bill demurrable for multifariousness, may be dismissed by the Court, of its own accord. *Warthen vs. Brantley and Daniel.*..... 574
5. This objection is not favored by the Courts. *Ibid.*
6. A bill filed for the settlement of two firms, is not multifarious, where the defendant is the same, and the settlement of the one firm is indispensable to the settlement of the other. *Ibid.*
7. One defendant cannot demur for multifariousness, on account of the joinder of another defendant, who does not object. *Ibid.* ;
8. To sustain a bill against the charge of multifariousness, it is not indispensable that all the parties should have an interest in all the matters contained in the suit; it is sufficient if each party has an interest in some matter in the suit, which is common to all, and they are connected with others. *Worthy et al. vs. Johnson et al.* 8 Ga..... 236
9. To protect a bill from the charge of multifariousness, it is not necessary that the interest of the parties be the same, as to all the matters embraced in the suit; it will be sufficient if they have a common interest in one or more, which are connected with the rest. *Booth and another vs. Stamper.* 10 Ga..... 109
10. A bill for one year's support of a decedent's family, and praying an account of the co-partnership, against his executors and a surviving partner, and charging a combination, is multifarious, and one of the causes of complaint will be stricken out. *Silcox et al. vs. Nelson et al.* Ga. Decisions, part I..... 24

IV. EVIDENCE.

1. The answer of one defendant in Equity, is evidence against a co-defendant, who is his privy in estate. *Morris vs. Foote et al. Ga. Decisions, part II.*..... 119
2. How far a defendant's answer is evidence for him, see *Eastman et al. vs. McAlpin. 1 Kelly.*..... 170
3. What parts of the answer must be proved. *Ibid.*
4. A co-defendant to a bill in Equity, who is made so for mere form's sake, and against whom no decree is prayed, may be examined as a witness, on the trial of the cause, if necessary. *Ragan et al. vs. Echols. 5 Ga.*..... 71
5. Parol evidence is inadmissible, to prove any contract different from the written agreement, unless from fraud, accident or mistake, the instrument fails to speak the intention of the parties. *Wynn, Shannon & Co. vs. Cox. 5 Ga.*..... 373
6. Charges in a bill by a distributee against an administrator, that he had frequently called on him to account and pay up: Held, to be immaterial, and when denied by the answer, need not be proven. *Fall, Adm'r, vs. Simmons et al. 6 Ga.*..... 265
7. Where an answer is responsive to a bill, defined. *Field vs. Howell. 6 Ga.*..... 423
8. To authorize the admission of parol evidence in a case, a sufficient foundation must be laid therefor in complainant's bill, by making such averments as will constitute fraud, or from which a Court of Equity will presume fraud. By WARNER, J. *Robson, Adm'r, vs. Harwell and Wife. 6 Ga.*..... 589
9. Where no replication is filed to an answer in Equity, and the parties go to trial upon the bill and answer, the whole of the answer, whether responsive to the bill or not, is taken as true. *Baldwin vs. Lee. 7 Ga.* 186
10. Where a grantor goes into Chancery to avoid his own deed, on the ground of insanity, the burden is upon him to prove it, at the time the deed was executed, the law presuming sanity. But if habitual insanity is proven, previous to the execution of the deed, the presumption of law is, that it continues to the time when the deed was executed; and the burden of proving sanity, at the making of the deed, is devolved upon the other side. *Dicken vs. Johnson. 7 Ga.*..... 484

11. The admission of *ex parte* affidavits, is an exception to the general rule, and is allowable only in waste, or in cases where irreparable mischief might ensue. *Lewis vs. Leak et al.* 9 Ga..... 95
12. Where a bill alleged that there was a debt due on a judgment by the co-partnership firm of E. W. & J. D. in favor of C. B. and that a *fi. fa.* had issued thereon, which had been paid off by T. C. & G. J. T. as indorsers; and upon the trial, a *fi. fa.* was offered in evidence, in favor of C. B. *vs.* E. W. D. as principal, and J. D., T. C. and G. J. T. as indorsers: *Held*, that the evidence was properly rejected, on the ground of misdescription, there being no offer to amend so as to make the *allegata* and *probata* correspond. *Dennis et al. vs. Ray, Receiver.* 9 Ga.. 449
13. The answer of one co-partner to a bill in Equity, filed against the co-partnership, which contains admissions against the interests of the company, although not filed as an answer in the cause, may be read in evidence as a written admission, on due proof of its execution. *Ibid.*
14. The answer of a defendant is evidence for him, only so far as it is responsive to the call of the bill for discovery, or necessarily connected with the responsive matter or explanatory of it. *Lee vs. Baldwin.* 10 Ga..... 209
15. When requested to do so, it is not only the province, but the duty, of the Court, on the trial of Equity causes, to instruct the Jury what portions of the defendant's answer are *responsive* to the complainant's bill, so that the Jury may understand from the proper source, what is legal evidence for their consideration. *Beall, Adm'r, vs. Beall and Beall.* 10 Ga..... 342

V. DECREES.

1. Relief may be granted under the general prayer of a bill, where it is consistent with the case made by the bill, and not inconsistent with the specific relief prayed. *Marine and Fire Ins. Bank vs. Early et al. R. M. Charl.*..... 279
2. A decree in favor of a party, dying *pendente lite*, is void, and may be set aside by subsequent original bill. *Keith vs. Willingham. Georgia Decisions, part II.*..... 161
3. So of a decree in favor of a person who never existed, or has been beyond seas seven years. *Ibid.*
4. But as to other parties, such decree is conclusive, and cannot be reversed by new original bill. *Ibid.*

5. Where a decree in Equity, against a guardian, is silent *as to the time when he committed the devastavit*, and where the surety was discharged by the Ordinary, *before* the suit was commenced in which the decree was rendered, the decree itself is insufficient to charge him upon the bond. *Bryant, Guardian, et al. vs. Owens and Wife.* 1 *Kelly*..... 372
6. When the plaintiff, in the first instance, is entitled to a discovery, the Court will not only give him the discovery, but will, (on a proper prayer for that purpose,) decree the appropriate relief. *McLaren vs. Steappe.* 1 *Kelly*..... 377
7. The “*eventual condemnation money*,” secured by an injunction bond, is the amount *ultimately* fixed and settled by the judgment or decree of the Court. *Lockwood vs. Saffold.* 1 *Kelly*..... 73-4
8. Where there is a special prayer and a general prayer, the complainant under the general prayer, may have such other relief only, as is consistent with the case made in the bill and with the special prayer. *Butler et al vs. Durham.* 2 *Kelly*..... 420
9. A decree in Equity, in this State, need not recite the pleadings and proofs in the cause, as in England. *Saunders vs. Smith, Adm’r.* 3 *Kelly*..... 126
10. A decree in an Equity cause, for a specific sum of money, under the 13th Rule of Equity Practice, established by the Judges in convention, under the authority of the Act of 1821, may be enforced by a *capias ad satisfaciendum*, against the defendant. *Ibid*..... 127
11. Final decree in Equity void, unless through the intervention of a Jury. *Hargraves et al. vs. Lewis.* 3 *Kelly*..... 165
12. In a bill filed to enjoin the collection of a judgment against the surety on a usurious contract, by the principal, an order passed at Chambers, before the return term of the bill, directing the principal and legal interest tendered in the bill, to be accepted by the plaintiff, in full satisfaction of the judgment, is in the nature of a final decree, and void, because the Judge of the Superior Court, as Chancellor, has no right to pass such an order; nor can he decree, finally, in any cause, without the intervention of a Jury. *Ibid*.
13. In a bill in Equity, every material fact to which the plaintiff means to offer evidence, must be distinctly stated. No facts are properly in issue, unless charged in the bill; nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleading and evidence; for the Court pronounces its decree, *secundum allegata et probata.* *Robson, Adm’r. &c. vs. Harwell and Wife.* 6 *Ga.*... 539

14. Where a decree was obtained in favor of legatees, against the executors of the testator's will, for their legacies under it, and the executors have admitted assets in their hands sufficient to pay them: *Held*, that property which had been distributed to another legatee, under the will, with the assent of the executors, could not be first seized and sold, in satisfaction of such decree against the executors alone, when it did not appear that there was any deficiency of assets, to pay all the legacies, and the legatee, whose property was taken, was no party to the decree; notwithstanding, it was declared by the decree, that it should be a lien upon, and bind the whole estate of the testator. The estate of the testator, in the hands of the executors, is first liable for the satisfaction of the decree, before such portion of it as had been distributed to legatees who were not parties to the decree, and who had been in the possession of it for several years, with the assent of the executors. *Scranton et al. vs. Demere et al.* 6 Ga..... 92
15. Where, by a decree of a Court of Equity, a specific sum of money was decreed to be due to the maker of an unnegotiable promissory note, by the payee thereof: *Held*, that such decree could not be impeached by extrinsic evidence, so as to impair or defeat the equitable right of such maker, to set-off such decree for the full amount thereof, against such note in the hands of an assignee, for a valuable consideration, but who had never given any notice to the maker of the note, of such assignment. *Guerrey vs. Perryman.* 6 Ga..... 119
16. When a cause in Chancery is submitted, on the bill and answer alone, to the Jury, and the answer plainly, fully and positively denies all the facts and circumstances charged in the bill upon which the complainants' equity is founded, no decree can be rendered in favor of the complainants. *The Ruckersville Bank et al. vs. James Hemphill et al.* 7 Ga..... 396
17. The decrees or judgments of a Court of Equity, are embraced within the Dormant Judgment Act of 1823. *Curry vs. Piles.* 8 Ga..... 32
18. It is no objection to a decree that it is entered by consent. *Hardwick vs. Hook, Receiver.* 8 Ga..... 345
19. As to effect of judgment on demurrer, to a bill of review, see *Carey, Assignee, vs. Giles, Receiver.* 10 Ga..... 9

VI. PRACTICE: AND HEREIN OF AMENDMENTS.

1. Where the title is in dispute, and facts are necessary to be ascertained, to determine such dispute, it will be referred to a Master in Chancery, to examine and report thereon. *Bolton vs. Flournoy. R. M. Charl.*..... 125

2. Although the practice in Georgia is, to associate a Special Jury with the Judge of the Superior Court, in the determination of Chancery causes, there is no law which imposes the necessity of such association. *McGowan vs. Jones et al. R. M. Charl.*..... 184
3. The death of one defendant to a suit in Equity, only abates the proceedings *quoad* him. *Howard vs. Bank of Darien. R. M. Charl.*..... 216
4. In this State the right of appeal from a Special Jury, to a hearing before another Special Jury, exists in Equity cases. *Pool vs. Barnett. Dudley.*..... 8
5. Costs do not always, in Chancery, follow the event of the cause; they rest in the sound discretion of the Court. *Pearce & Co. vs. Chastain. 3 Kelly.*..... 230
6. Under the Act of 1838, authorizing the service of writs, rules and orders in Equity, by publication, it is necessary that four months shall elapse between the first and last publication, and that the publications shall also be made once in each of the four months next preceding the term at which defendant is called upon to plead and answer. *Smith, Adm'r, et al. vs. Thompson. 3 Kelly.*..... 25
7. If a cause is not reached in its order, on the docket, by the exercise of reasonable diligence on the part of the Court, the effect is a continuance by the Court. *Ibid.*
8. According to the rule of Equity Practice in this State, the decree need not recite the pleadings and proofs in the cause, as in England. *Saunders vs. Smith, Adm'r. 3 Kelly.*..... 126
9. The affidavit of one of the complainants, verifying injunction bill, sufficient. *Hemphill et al. vs. Ruckersville Bank. 3 Kelly.*..... 443
10. After a demurrer to the whole bill is sustained, there is nothing to amend by; but if any part of the bill is untouched, the whole may be amended. *Dudley vs. Mallery. 4 Ga.*..... 52
11. The amendments to a bill, generally refer to the time of suing out the original. They become part of it, and with it, constitute but one record. *Carey, Assignee, vs. Hillhouse. 5 Ga.*..... 251
12. A copy of the bill and subpœna, may be served by a private individual, as well as the Sheriff. *Ibid.*
13. Where a defendant, described as such, in the bill, and against whom a subpœna is prayed, is served with a copy, and with it, with a *sub pœna*, referring to the bill in its descriptive parts, and naming other

defendants, but not containing *his* name: *Held*, that such service is sufficient to require such defendant to appear and answer. *Ibid*.

14. Amendments to sworn answers will be allowed, in cases of mistake, fraud, surprise, and the discovery of new matter, but with great caution and difficulty. There is, however, no general rule, and the application is made to the discretion of the Court, and each case must depend very much upon its own merits. *Martin vs. Atkinson*. 5 Ga... 390
15. Amendments will be allowed, after replication filed. *Ibid*.
16. Where it is made to appear to the Court, upon oath, that the defendant intended to swear, when he first put in his answer, as he desires by the amendment to be permitted to swear, it will be allowed. *Ibid*.
17. On the trial of an Equity cause in the Superior Courts of this State, counsel for the complainant is entitled to open and conclude the argument to the Jury, where both parties have introduced evidence. *Guerry vs. Perryman and Dennard*. 6 Ga..... 119
18. Where a cause is submitted to the Jury, on bill and answer and replication, and the defendant introduces no evidence, the defendant is entitled to the conclusion in the argument. *Fall, Adm'r, vs. Simmons et al.* 6 Ga..... 265
19. A complainant may amend the title of his bill, so as to make it conform to the true character of the case made by it. The prayer of the bill may also be amended, so as to enable the complainant to have such relief as the allegations in his bill will authorize. *Dearing vs. The Bank of Charleston*. 6 Ga..... 581
20. Where a bill in Equity is amended by the complainants at the first term, and served within two months thereafter, defendant cannot excuse himself from complying with the usual rule, on the ground of the amendment, more especially as to the original bill. Whether or not a sufficient time has elapsed from the service of the amendment, to require an answer to that, at the succeeding term, is a question for the sound discretion of the Court, where the order allowing the amendment does not specify the time within which it shall be answered. *Carter and another, Ex'rs, vs. McDougald et al.* 6 Ga..... 93
21. Where formal parties to a bill, residing without the jurisdiction of the Court, against whom no decree is prayed, have not been served personally or by publication, the cause may still proceed against the real parties who are served. *Ibid*.
22. A defendant in Equity is not required to answer at the term to which the bill is returned. The words, "*next Court*," in the Act of

- 1799, construed to mean the next Court after that to which the bill is returned. *Green vs. McLaren*. 6 Ga..... 107
23. An application by a defendant to file a supplemental answer in Chancery, will be narrowly and closely inspected; and to authorize the Court to allow it, a just and necessary case must be clearly made out. *Carey, Assignee, vs. Ector, Adm'r, et al.* 6 Ga..... 99
24. The application to the Court, for leave to file a supplemental answer, on the ground of a mistake in fact, or surprise, must be accompanied with an affidavit, in which the defendant must swear, that when he put in his original answer, he did not know the facts or circumstances on which he applies, or any other circumstances upon which he ought to have stated the facts otherwise; or that when he swore to his original answer, he meant to swear in the sense in which he now desires to be at liberty to swear to it. *Ibid.*
25. Where a bill was filed by several creditors, for the payment of separate and distinct demands against the stockholders of an incorporated company, and one of the complainants died pending the suit: *Held*, that the suit did not abate as to the other complainants, but that the name of the deceased complainant might be stricken out of the bill, and the other complainants proceed to obtain a decree for their separate debts. *Berry et al. vs. Matthews et al.* 7 Ga..... 457
26. Where exceptions have been filed to defendant's answer, by the complainant, and he afterwards files his replication, and the cause is set down for a hearing, the Court will not hear the exceptions at the trial, but will consider them as having been waived by the complainant. *Ibid.*
27. The 4th Common Law Rule of Practice, which authorizes a continuance on appeal trials, for the purpose of making a substantial amendment to either declaration or answer, does not apply to Equity causes. *Ibid.*
28. The 6th section of the Judiciary Act of 1799, and the 57th Common Law Rule of Practice, requiring the production of books and papers at the trial, upon ten day's notice, do not apply to Equity causes. *Ibid.*
29. Where the answer of the defendant is made and sworn to before his death, it may be used on a motion to dissolve the injunction, though filed in Court subsequently. *Dennis vs. Green, Adm'r.* 8 Ga..... 197
30. A bill may proceed, without making the representatives of a mere formal party, parties to the proceeding. *Ibid.*
31. On application for a writ of *ne exeat*, by a wife against her hus-

band, pending a suit for a partial divorce and *alimony*, her affidavit is sufficient; she being, in this respect, considered independent of her husband. *McGee vs. McGee*. 8 Ga..... 295

32. If the threats of the husband to leave the State, come to the knowledge of the wife, through the information of others, their affidavits should, if practicable, be filed with her's. If, however, she swears, *absolutely*, that he has threatened to remove, that is sufficient. *Ibid*.
33. The pleadings in Equity causes, pending on the appeal, are not amendable as a matter of course, but only by leave of the Court, *on special cause shown*. *The Ga. R. R. & B'k'g Co. vs. Milnor & Co.* 8 Ga. 313
Also, *Boyd, Adm'r, vs. Clements*. 8 Ga..... 522
34. Where, upon special cause shown, the Court below, in the exercise of its discretion, allows an amendment, this Court reluctantly interferes to control that discretion. *Ibid*.
35. A bill will never be dismissed for want of parties, when the proper parties can be made, either by amendment or supplemental bill. *Hightower vs. Mustian*. 8 Ga. 506. *Hightower vs. Thornton*. 8 Ga..... 486
36. If it is apparent that parties cannot be made, and there can be no decree without them, the bill will be dismissed. *Ibid*.
37. The 4th Common Law Rule of Practice does not apply to Courts of Equity. *Boyd, Adm'r, vs. Clements, Guardian*. 8 Ga..... 522
38. Where a cause in Equity is pending, and the pleadings made up and issue joined, the complainant is not entitled to amend, as a matter of right, but amendments will be allowed, upon special cause shown. *Ibid*.
39. Surprise is good special cause for the allowance of an amendment. *Ibid*.
40. Where the pleadings are made up and the cause on trial, the evidence closed and the argument progressing, it is not competent to amend the bill but for special cause, and not then, if the amendment introduces a new cause of action. *Peacock vs. Terry*. 9 Ga..... 137
41. Facts alleged positively in a bill, are constructive admissions in favor of the defendant, and need not be proven. The complainant cannot deny them, if they be not true, but must recover according to the case he makes upon the record. *Ibid*.
42. Two witnesses, or one with corroborating circumstances, will be required to outweigh an answer responsive to a bill, more especially if

there be three defendants, all concurring in the same statement. *Galt vs. Jackson*. 9 Ga..... 151

43. As a matter of practice, the Supreme Court will not control the discretion of the Court below, in refusing to suspend a cause then on trial, for the purpose of taking up another cause, to permit a defendant's answer thereto to be filed, so as to make it evidence, as an answer in the cause then on trial; especially, when the party who had answered was dead, and there were objections raised to its being filed. *Dennis vs. Ray, Receiver*. 9 Ga..... 449

44. After the pleadings are made up and the cause set down for a hearing, the answer cannot be amended upon the ground that the defendant was ignorant of the availability in law of a fact within his knowledge, from the time the suit was instituted, as a defence thereto. *Branch, Adm'r. vs. Dawson*. 9 Ga..... 592

45. In a bill filed by the receiver of the Bank of Macon, to set aside an assignment of certain notes to the Bank of Columbus: *Held*, that persons liable upon those notes, and who had been sued thereon by the assignee, and who were made parties defendants to the bill, have an interest in the question of title to their notes; and upon the trial may introduce evidence and be heard as to that question, but that no decree can be rendered for or against them. *Carey, vs. Giles, Receiver*. 10 Ga..... 9

46. When an amendment is made to a bill before answer filed, even if it be immaterial and trivial, a defendant may demur *de novo*, to the whole bill. *Quere*, as to the reasonableness of this rule. *Booth and another vs. Stamper*. 10 Ga..... 109

47. When an amendment is made at any time to a bill, the defendant may demur to the amendment. *Ibid*.

48. When an amendment is made to a bill after demurrer made and decided and answer filed, the defendant cannot demur again to the whole bill, unless the amendment is material. *Ibid*.

49. An amendment is material, when it so varies the case made in the original bill as to change the complainant's equity. *Ibid*.

50. Upon demurrer, the Court will not inquire into the regularity or competency of an amendment to the bill, previously allowed by the Court. *McGehee and another, Ex'rs, vs. Jones*. 10 Ga..... 127

See *Amendments, II. b*.

VII. LACHES AND WAIVER.

1. The practice of and rule Court, requiring that a bill of revivor should be filed, to make the legal representatives of a deceased complainant a party to the suit in Chancery, may be waived by agreement between such representative and defendant. *Brog et al. vs. Bayley. R. M. Charl.*..... 109
2. And a replication will be dispensed with, under similar circumstances. *Ibid.*
3. The Water-lot Co. of the City of Columbus, conveyed by deed, to defendants, a piece of ground, upon condition that the bargainees should be restricted to the privilege of erecting and running a saw-mill, or saw-mills, on said premises: *Held*, that a Court of Equity will not restrain, by injunction, the owners from using the building on said lot of land, for other purposes than those mentioned in the deed, after they have incurred considerable expense in the construction thereof, or compel them to stop the machinery already in operation, no sufficient excuse being rendered by the company, for their failure or neglect, in not applying at an earlier period. *Water Lot Co. vs. Brooks & Winter. 5 Ga.*..... 315
4. A bill by distributees against the representatives of a deceased administrator, will not be entertained after a lapse of *nineteen* years from the rendering of the accounts to the Court of Ordinary, where there is no allegation of fraud or mistake, and no excuse for the delay. *Akin et al. vs. Hill et al. 7 Ga.*..... 573
5. A Court of Equity will enjoin an administrator from recovering a tract of land, where the intestate has been dead 26 years, and the heirs were all of age at the time of the death, and for more than seven years next before the commencement of the action, and where there are no debts against the estate, and the defendant has been in adverse possession for more than twenty years before administration granted. *Jonekin vs. Holland, Adm'r. 7 Ga.*..... 589
6. A bill filed for the recovery of damages for the breach of a bond for titles, is a demand founded on a sealed instrument, and such a claim is not barred until twenty years after the accrual of the right of action thereon. *Caldwell vs. Montgomery and Wife. 8 Ga.*..... 106
7. In Courts of Equity, fraud has been held to be an exception to the operation of the Statute, until the discovery of the fraud. *Ibid.*

See Limitation of Actions.

ERROR.

I. GENERALLY: WHEN IT LIES, &c.

II. OF THE WRIT: ASSIGNMENT, &c.

I. GENERALLY: WHEN IT LIES, &c.

1. A writ of error will not be sustained, on account of the refusal of the Court to grant a continuance, unless it is a most plain and palpable instance of the arbitrary and oppressive exercise of the discretion necessarily vested in it by law. *Sealy vs. The State.* 1 *Kelly*..... 215
2. It is a general rule that no person can bring a writ of error, who was not a party or privy to the record, or prejudiced by the judgment. *Townsend & Bros. vs. Davis.* 1 *Kelly*..... 496
3. And this must appear by the record. *Ibid.*
4. A writ of error will not lie for errors alleged to have been committed by the Court below, upon the trial of a cause before the Petit Jury, where an appeal has been entered and is pending. *Carter and Wife vs. Buchanan.* 2 *Kelly*..... 338
5. Errors alleged to have been committed by the Superior Courts, prior to the organization of the Supreme Court, will not be reviewed by the latter Court. *Saunders vs. Smith, Adm'r.* 3 *Kelly*..... 125
6. The power of reviewing all the decisions, interlocutory and final, of the Superior Courts, even those depending upon mere discretion, of right belongs to the Supreme Court; yet, it will not interfere to correct the abuse of discretionary power, unless it has been exercised in an illegal, unjust or arbitrary manner. *Johnson vs. Fowler & Newton.* 3 *Kelly*, 117. See, also, *Moody vs. Fleming.* 4 *Ga.*..... 115
7. Courts of Chancery being clothed with greater amplitude of discretion than Courts of Common Law, a Court of Errors will interfere more sparingly with the exercise of the discretionary powers of the former than of the latter, notwithstanding the duties of both are discharged by the same incumbent, in Georgia. *Ibid.*
8. Writs of error will lie for the improper granting or refusing of a continuance. *McDougald vs. The Central Bank.* 3 *Kelly*..... 183
9. Writ of error does not lie to errors of fact found in the verdict or decree of the Jury. *Beall & Scott vs. Rowell.* 4 *Ga.*..... 525

10. The dismissal of a writ of error is an affirmance of the judgment of the Court below. *Rice et al. vs. Carey, Assignee.* 4 Ga..... 558
11. Where a decree in Equity has been before the Supreme Court, on a writ of error, and the judgment of the Court below affirmed, a bill of review will not lie to reverse such decree, for error apparent on the face thereof. *Ibid.*
12. A writ of error will not be dismissed, because the same cause has been previously before the Supreme Court, where the error assigned is different, and the objection not raised or pleaded in the Court below. *Hargraves vs. Lewis.* 6 Ga..... 207
13. Judgment creditors claiming a participation in a common fund, have such an interest in the order of the Circuit Court distributing it, as to entitle them to carry up the same by writ of error. *Adkins et al. vs. Baker and another.* 7 Ga..... 56
14. Error does not lie to the decisions of the Court below, where the party, subsequent to the decisions, voluntarily dismisses his case. *Mott vs. Hill, Adm'r,* 7 Ga. 79. See, also, *Kent vs. Hunter.* 9 Ga.... 207
15. After a judgment of severance, either party may sue out a writ of error. *Hargraves vs. Lewis.* 7 Ga..... 110
16. The decision of the Court, overruling objections to evidence, cannot be assigned for error, unless it appears that the evidence was in fact given to the Jury. *Stubbs vs. The Central Bank.* 7 Ga..... 258
17. If the admission of improper evidence is assigned for error, the substance of it must be set out; if it was not material, the rejection of it is not ground of error. *Ibid.*
18. The party who challenges the legality of the opinion of an inferior tribunal, must prove the error by the record. The Court below is presumed to have decided correctly, until the contrary is shown. *Ibid.*
19. A writ of error does not lie in a criminal case, at the instance of the State. *The State vs. Jones.* 7 Ga..... 422
20. Where the Circuit Court misinterprets the decision of the Supreme Court, the cause will be remanded, with instructions. *Oglesby vs. Gilmore, Adm'r.* 8 Ga..... 95
21. The pendency of a writ of error does not affect the judgment of the Superior Court, until reversed. If affirmed, it is binding *ab initio.* *Allen, Ball & Co. vs. The Mayor, &c.* 9 Ga..... 286

22. The writ of error is in the nature of a new suit, and lies only to a final judgment. *Ibid.*

II. OF THE WRIT: ASSIGNMENTS, &c.

1. The Supreme Court will not entertain a writ of error upon points not springing out of the record. *Smith vs. Kershaw.* 1 *Kelly*..... 259
2. The writ will be dismissed if the assignment of errors, is not filed on or before the first day of the term. *Gillman vs. The Central Railroad & Banking Co.* 1 *Kelly*..... 107
3. The surety on appeal, must be a party to the writ of error. *Dill et al. vs. Jones.* 2 *Kelly*, 80. See also, *Long et al. vs. Strickland.* *Ibid.* 349. *Ibid*, 237. *Ibid*, 409. *Ibid*, 440. 3 *Kelly*..... 584
4. The writ of error may be amended so as to include the surety, by his written consent. *Long et al. vs. Strickland.* 2 *Kelly*, 349. See also 2 *Kelly*..... 409
5. If there be no writ of error, the case will be dismissed. *Harris vs. The State.* 2 *Kelly*..... 211
6. Where there is no appearance for either party, the writ of error will be dismissed. *Smith vs. Justices, &c. Randolph County.* 4 *Ga*..... 156
7. Does not lie to errors of *fact* in the decree of the Jury. *Beall & Scott vs. Rowell.* 4 *Ga*..... 525
8. Writ of error will be dismissed, if notice of the signing of the bill of exceptions, and copies of the writ of error and citation are not served within the time required by the Act organizing the Supreme Court, and the 21st Rule of Court. *Ibid.*
9. The Act of 29th December, 1847, as to parties to a writ of error, does not apply to cases occurring before that Act. *Wilder vs. Lumpkin.* 4 *Ga*..... 209
10. A writ of error, sued out in the name of Catherine E. Beall and others, is defective, in not stating the names of the others. *Beall vs. Ex'rs of Fox.* 4 *Ga*..... 404
11. Where the names of *the others*, are apparent on the face of the record, the writ may be amended by the record; provided it does not prejudice the rights of any of the parties thereto. *Ibid.*
12. Writ of error will be dismissed, if proper parties are not made by

- sci. fa.* should either party die pending the writ of error. *Lee, Ad'mr. vs. Wheeler.* 4 Ga..... 541
13. The writ of error and citation need not, and ought not, to be filed until the filing of the original notice, with entry of service thereon. *Anderson vs. The Darien Bank.* 5 Ga..... 585
14. The writ of error will be dismissed, if no original notice of the signing and certifying of the bill of exceptions is filed, as required by the Statute, nor will an acknowledgment of service of a copy notice of the filing of the bill of exceptions, be considered a compliance with the Statute. *Ibid.*
15. If thirty-five days intervene between the signing the bill of exceptions and the suing out and serving the writ of error, citation and notice, the writ of error will be dismissed. *Perry & Peck vs. Higgs.* 6 Ga.. 43
16. Where the bill of exceptions is signed and certified only eight days before the session of the Supreme Court for that judicial district, the writ of error should be made returnable to the next succeeding term for that district; such being the first term, within the meaning of the amended Constitution. *Chapman vs. Stiles.* 6 Ga..... 113
17. The Court will not strike out the name of one party in the writ, and insert another. *Arnold vs. Wells and Wife.* 6 Ga..... 380
18. If no assignment of error is filed, as required by the Rule the writ will be dismissed. *Goneke et al. vs. Garrett.* 4 Ga..... 119
19. The assignment of errors cannot enlarge the bill of exceptions, but must be supported by it. *Smith & Shorter vs. Mitchell.* 6 Ga..... 458
20. The writ of error will not be dismissed because the record does not show that the costs in the Court below have been paid. *Brewer, Ex'rs. vs. Brewer.* 6 Ga..... 587
21. All the parties (whether suing or sued, individually or representatively) to the cause below, must be joined in the writ of error. *Harrington, Adm'r. vs. Roberts and Wife.* 7 Ga..... 510
22. The writ of error will be dismissed, if a copy is not served and an entry made thereof, within the time required by the 21st Rule of Court. *Turner vs. Collins.* 8 Ga..... 252
23. A copy of the writ must be served, as required by the rule. This right may be waived. *Chapman vs. Gray, Ex'r.* 8 Ga..... 337
24. The writ or error is an original writ. *Allen, Ball & Co. vs. The Mayor &c. Savannah.* 9 Ga..... 286

25. The object and effect considered. *Ibid.*
26. It is in the nature of a new suit, and lies only to a *final* judgment. *Ibid.*
27. When a cause is carried up, and the judgment of the Superior Court affirmed, it takes effect from the date of the first judgment. *Ibid.*
28. Where the decision of the Court, on a motion for a new trial, is excepted to, it is not competent for plaintiff in error, to assign error upon decisions not excepted to, and not embraced in the motion for a new trial. *Bond vs. Baldwin.* 9 Ga..... 9
29. Where a writ of error is dismissed, no damages are recoverable on the cause in the Court below. *Collins vs. Turner.* 9 Ga..... 112
30. A writ of error does not lie from a voluntary non-suit. *Kent vs. Hunter.* 9 Ga..... 207
31. Neither by the Common Law nor the Act authorizing the Supreme Court in this State, is a writ of error a *supersedeas*, unless bond and security is given. *Allen, Ball & Co. vs. The Mayor, &c.* 9 Ga..... 286
32. All persons interested in the judgment sought to be reviewed, must be made parties to the writ of error, and in the order in which they stand in the record below; when, therefore, one of two or more defendants, against whom a decree has been rendered, brings a writ of error to reverse it, it is necessary for him to join his co-defendants as plaintiffs in error, and upon the trial they may unite with him and assign errors against the decree, or they may sever and be heard in defence of the decree. *Carey, Assignee, vs. Giles, Receiver.* 10 Ga..... 1
33. If such plaintiff in error has failed to make his co-defendants parties plaintiff to the writ of error, they may be added by motion, without delay or cost, with the same privilege of assigning error or severing. *Ibid.*

As to amendment of writ of error, see title *Amendment, I.*

ESCAPE.

1. An action against a Sheriff for an escape out of a final process, under the Statutes of Georgia, survives against his representatives. *Neul vs. Haygood.* 1 Kelly..... 515

2. The undertaking of the Sheriff, is to retain the debtor for the plaintiff's satisfaction, against all things but the act of God and the King's enemies. *Ibid.*
3. Where the Sheriff arrested a defendant under *ca. sa.* and took a bond for his appearance for less than twice the amount of the creditor's claim, in good faith: Held, that the escape was negligent and not voluntary, and that the Sheriff might retake the defendant, and discharge an attachment for contempt, by surrendering him in Court. *Colley vs. Morgan*, 9 Ga. 178
4. In an action of debt against the Sheriff, on his official bond, for an escape, on *mesne process*, the insolvency of the original debtor may be given in evidence in mitigation of damages—the injury actually sustained by the plaintiff, and not the specific amount of his debt, being the measure of damages. *Crawford, Gov. &c. vs. Andrews et al.* 6 Ga. 244

ESCHEAT.

1. If an alien intermarries with a woman who is a citizen, and holds real estate, it seems that thereby the realty would escheat, and be forfeited to the public. *Fitzgerald vs. Garvin*, T. U. P. Char. 285
2. Under the Act of 1801, escheating the property of any one dying without will and without heirs, the escheator cannot interfere with the Ordinary's granting letters of administration prior to the inquest of the Jury, as required by that Act. *Ex parte Carnochan*. T. U. P. Char. 314

ESCROW. See *Bonds*, I. 16.

ESTATES. See *Deed*, I. *Devise and Legacy*, *passim*.

ESTOPPEL.

1. A party claiming under a grantor, as distributee or legatee, cannot impeach his deed for want of consideration or for fraud. Both the grantor and his privies are estopped from denying it. *Adm'rs of McClesky vs. Ledbetter*. 1 Kelly. 557

2. In a *sci. fa.* to make parties, the defendant, by demurring to being made a party, on the ground that the suit set out in the record has abated, admits the existence of the action, and is estopped by the judgment overruling the demurrer, from denying the record. *Alexander, Adn'r, vs. Sutlive, Ex'r.* 3 *Kelly*..... 30
3. Where the executor of a surety applies for the control of a *fi. fa.* against his principal, the principal will not be allowed to show that he is an executor *de son tort.* *Harris vs. Wynne.* 4 *Ga.*..... 521
4. The receipt of legacies under a will, and long acquiescence by the heirs at law, may amount to an estoppel, unless explained, as by infancy, &c. *Vance et al. vs. Crawford, &c.* 4 *Ga.*..... 445
5. If the recovery in a suit, will itself be the cause of action, in favor of the defendant, against the plaintiff, that fact will be a good defence to the first suit, because the Courts will avoid circuitry of action. *Sibley vs. Beard.* 5 *Ga.*..... 550
6. A plaintiff in *fi. fa.* requiring the Sheriff to levy on the *interest* of defendant in a lot of land, is not thereby estopped in another suit from contesting defendant's title to the land. *Morris vs. McCamey.* 9 *Ga.* 160
7. Where an *alias fi. fa.* has been issued by the Clerk without an order of the Court, the objection to the regularity of the proceeding comes too late, after the parties had litigated a claim case under such *alias fi. fa.* The defect will be considered as having been waived. *Watson vs. Halstead, Taylor & Co.* 9 *Ga.*..... 275
8. Where the charter of a bank prescribes the mode in which the contracts of the bank shall be authenticated, in a suit by the holder of a bill against the indorser, on a bill drawn by himself as President of the bank, and in his own favor, he cannot object to the regularity of the contract. *McDougald vs. The Central Bank.* 2 *Kelly*..... 191
9. Judgment against the party, with notice of the suit to the party liable, is conclusive; without notice, it is *prima facie* evidence only of liability. *Napier vs. Neal.* 3 *Kelly*..... 301

See *Execution*, II.

ESTRAY.

1. The Justice of the district where an estray is tolled, and the Clerk of the Inferior Court, have the right to determine the amount of compensation due for keeping the same. *Parker vs. King. Ga. Decisions, part I.*..... 181
2. They have power to refuse compensation, when the estray has been put to work. *Ibid.*

EVENTUAL CONDEMNATION MONEY. See *Bonds, IV.*

EVICTION.

1. A judgment of a Court of competent jurisdiction, is sufficient proof of an eviction to sustain an action on the warranty. *Leary vs. Durham. 4 Ga.*..... 592
2. Sale of land under an outstanding incumbrance against the vendor, is an eviction, in judgment of law ; and the vendee is entitled to have the contract rescinded, and the notes given in payment cancelled. *Martin vs. Atkinson. 7 Ga.*..... 228
3. A vendee who takes up an outstanding incumbrance to protect his title, is entitled only to be refunded the amount paid out. *Ibid.*
4. A vendee who is legally evicted, and who re-purchases the property, is in, under a new and distinct title, and the price last paid is no criterion of damages for the injury he has sustained, on account of the failure of his vendor's title. *Ibid.*

EVIDENCE.

- I. GENERAL PRINCIPLES.
- II. DOCUMENTARY EVIDENCE: BOOKS, &c.
- III. INTERROGATORIES: DISCOVERY AT LAW, &c.
- IV. WITNESSES: OPINIONS: EXAMINATION, &c.
- V. PAROL EVIDENCE: ADMISSIBILITY, &c.: AND HEREIN OF SECONDARY EVIDENCE.
- VI. BURDEN OF PROOF.
- VII. HEARSAY: AND HEREIN OF THE SAYINGS OF SLAVES.
- VIII. ADMISSIONS.
- IX. EVIDENCE ON FORMER TRIAL.
- X. VARIANCE: PLEADING AND PROOF.
- XI. *RES GESTÆ*.
- XII. PRESUMPTIONS.

As to EVIDENCE IN CRIMINAL CASES, see *Criminal Law*, II.

As to PROOF OF DEEDS, see *Deeds*, II.

As to EVIDENCE IN EQUITY COURTS, see *Equity*, IV.

I. GENERAL PRINCIPLES.

1. The impossibility of furnishing better evidence, will not authorize the admission of that which is intrinsically defective and dangerous. *Martin vs. Adm'r of Tyffe. Dudley*..... 17
2. The execution of a promissory note, is evidence, in law, of a full settlement of all accounts up to the date thereof, except such as are specially excepted at the time. *Mills vs. Mercer. Dudley*..... 160
3. If a party suffers improper evidence to be admitted, without objecting at the time, it is a waiver of the objection. *Low vs. Com. of Pilotage. R. M. Charl*..... 302
4. A waiver of the irregularity of the proceedings before an inferior tribunal, is no consent to dispense with the proof of those proceedings. *The State vs. Peter. Ga. Decisions, part I.*..... 46
5. When an instrument is no longer essential to the legal title, the same proof is not required as when it is a part of the title itself *Ga. Decisions, part II.*..... 205
6. The record is the only legal evidence of the discharge of bail, upon the surrender of his principal, during the session of the Court. *Griffin vs. Moore. 2 Kelly*..... 334

7. Appointment of a Deputy Sheriff may be by parol. The admissions or his acts, sufficient evidence of his appointment. *Matthis vs. Pollard.* 3 *Kelly*..... 2
8. Evidence that there was a gift from A to B, without stating the manner and form, is inadmissible. *Carter and Wife vs. Buchanan.* 3 *Kelly*..... 518
9. Notice by a bank, that it will receive on deposit the depreciated bills of other banks, is no evidence of its insolvency. *Daniels vs. Kyle & Barnett.* 5 *Ga.*..... 245
10. While, as a general proposition, it is true that affirmative testimony should outweigh that which is negative, yet this rule of evidence does not apply, where some of the witnesses swear that the testator could measure corn, calculate interest, and transact ordinary business; and others that he could not. The testimony in both cases, is of the same character. *Pitts et al. vs. House.* 6 *Ga.*..... 324
11. The testimony of *relatives*, as such, should not be discredited. *Relationship* is a circumstance from which the Jury may infer a bias. *Ibid.*
12. A party in a Court of Justice is not estopped to deny *facts* recited in an Act of the Legislature. It is no *law*, and the Court is not bound to take judicial cognizance of it. The trial of the truth of facts belongs to the Judicial part of the Government. *Dougherty vs. Bethune, Assignee.* 7 *Ga.*..... 90
13. The testimony of a subscribing witness to a submission and award, is the best evidence of their execution. *Tyler vs. Stephens and another, Adm'r.* 7 *Ga.*..... 278
14. When a plea of former recovery is filed, and the record tendered to support it, it is a question for the Court to determine, upon inspection and comparison, whether the cause of action is the same, and if not the same, the record will be repelled; and if it is admitted, it then also becomes a question for the Court, how far and when parol evidence will be admitted to show that the cause of action was not submitted and passed upon in the former trial. *Adm'rs of McFarland vs. Adm'rs of Freeman.* 7 *Ga.*..... 211
15. If there be an attesting witness to an instrument, his evidence of its execution is the best, and must be produced, if in the power of the party. *Watts vs. Killburn.* 7 *Ga.*..... 356
16. If the witness is dead, or blind, or insane, or has become interested since the execution of the paper; or is beyond the process of the

Court; or is not to be found after diligent search, the course is, to prove his hand-writing. *Ibid.*

17. Testimony offered avowedly to impeach the credit of a witness, by showing contradictory statements, cannot, in the argument before the Jury, be used for a wholly different purpose. *Williams vs. Chapman.*
7 *Ga.*..... 467
18. A private Act of the Legislature, as to its facts and recitals, imports verity equally with the records of the Courts; still, it may be attacked for fraud in its procurement. *Beall, Adm'x, vs. Beall and Beall.*
8 *Ga.*..... 210
19. The admission of *ex parte* affidavits, is an exception to the rule, and is allowable only in cases of *waste*, or in cases where irreparable mischief might ensue. *Lewis vs. Leak and another.* 9 *Ga.*..... 95
20. The Jury are not bound to believe according to the number of witnesses, but may take into view their means of knowledge, &c. &c. and may believe *one* against *two* or more. But if *two* testify one way as to a material point, and *one* to the contrary, and *all are of equal credibility*, they are to believe the *two* rather than the *one*. *Dowdell vs. Neal.*
10 *Ga.*..... 148
21. Where a private Act of the Legislature was passed, legitimating certain persons therein named, and authorizing them to inherit as lawful heirs of their reputed father—which Act was alleged to have been passed without his assent: *Held*, that on the trial of the question of alleged fraud in procuring the passage of the Act, without such assent, it was competent for the party alleging the fraud to prove that the Senator, who was in the Legislature from the same County in which the reputed father lived, was present in the Senate, heard the bill read three times, and never heard any evidence of the assent of the reputed father, to its passage at that time. *Beall, Adm'x, vs. Beall and another* 10 *Ga.*..... 342
22. *Held*, also, that it was competent to prove by a witness, who read from a newspaper, in the hearing of the reputed father, the title of the Act, that he angrily replied, "that he wished some people would attend to their own business." *Ibid.*
23. Evidence is the means by which any fact which is put in issue, is established or disproved. Its relevancy and admissibility is for the Court; its sufficiency and effect for the Jury. *Hotchkiss vs. Newton.*
10 *Ga.*..... 567
24. It is competent for the Court to withdraw from the Jury, the consideration of evidence which has been illegally admitted. *Salter vs. Lessee of Williams.* 10 *Ga.*..... 186

II. DOCUMENTARY EVIDENCE—BOOKS, &c.

25. A merchant's and shopkeeper's books are evidence to prove the sale and delivery of goods, when it is shown that the books offered are of original entry, are in his handwriting; that he keeps fair books; has had dealings with the person charged, and that he kept no clerk, or if he kept a clerk he is dead. *Martin vs. Adm'r. of Tyffe. Dudley.* 17
26. Where merchant's books are introduced in evidence, they are open to remark from the Court, and to the strictest scrutiny by the Jury; and if there be the least suspicion of fraud, or unfair dealing, they will be disregarded. *Ibid.*
27. The whole of a document or writing offered as evidence, must be read if required, otherwise there can be no certainty as to the sense and meaning of the entire document. *Bank of South Carolina vs. Brown. Dudley.*..... 64
28. An administrator's accounts, which have been allowed by the Court of Ordinary, are, *prima facie* evidence for him, when called on to account, but never evidence of title in him, against a third person. *Cummings vs. Fryer. Dudley.*..... 183
29. A garbled or imperfect record will not be received in evidence. *Hale vs. Burton. Dudley.*..... 105
30. An account book, to be evidence, ought to show the daily transactions of the party: otherwise it will be rejected. *Williams vs. Abercrombie et al. Dudley.*..... 252
31. A copy of a receipt is not admissible without proper notice to produce the original, or proof of its loss or destruction. *Ex parte Simpson. R. M. Charl.*..... 111
32. A receipt in full is not conclusive against the party who gave it, but may be explained. *Gilmer et al. vs. Cameron. Ga. Dec. part I.*.... 142 •
33. The answer of one defendant in Equity, is evidence against his co-defendant who is his privy in estate. *Morris vs. Foote. Ga. Dec. part II.*..... 119
34. When a bond is lost, the acknowledgment of the obligor that he executed it, is sufficient without producing the subscribing witnesses. *Maynor vs. Lewis. Ga. Dec. part II.*..... 205
35. A deed recorded, will be admitted in evidence without farther proof. *Lessee of Truluck vs. Peeples. Kelly.*..... 5

36. Books of account about to be tendered in evidence, must be first proved to be the original books of entry, by the oath of the party tendering them, and then be submitted to the inspection of the Court, and if found free from all fraudulent appearances or circumstances, (such as material and gross alterations, false additions, &c.) and to contain the first entries or charges by the party, made at or near the time of the transactions to be proved, they are competent. If the contrary is discernible from the books, or comes out on examination of the party, they ought to be rejected. The credibility of the books and the party, are to be weighed by the Jury. *Taylor vs. Tucker*. 1 *Kelly*..... 233
37. Separate sheets of paper, containing the original entries of an account for lumber, though such sheets are attached to the declaration as a bill of particulars, are admissible in evidence, upon the footing of original books, and under the same rules and restrictions as are prescribed by the Courts in the case of merchant's books. *Ibid*.
38. When the plaintiff's only evidence is his original books, it becomes indispensable to prove, *aliunde*, by one or more persons having dealings with him, that he was in the habit of keeping correct accounts. *Ibid*.
39. An execution issued upon a decree of a Court of Equity, against a guardian, (in a bill filed against him as guardian, to charge him individually for waste, &c.) with a return of "*nulla bona*" thereon, is admissible in evidence, in a suit upon the guardian's bond against the surety. *Bryant, Adm'r. &c. vs. Owens and Wife*. 1 *Kelly*..... 368
40. Such decree is only *prima facie* evidence against the surety, who may inquire, *ab origine*, into the justice of the decree. *Ibid*.
41. A deed which recites a former deed and its loss, is evidence of the first deed, and the grantor and his privies are estopped by the recital. *Adm'r. McClesky vs. Ledbetter*. 1 *Kelly*..... 557
- * 42. Ancient documents (over 30 years old) are admissible in evidence, without proof of execution. *Ibid*.
43. A certified copy of the record of the action of the Inferior Court, in taking a Sheriff's bond made in vacation, is not evidence in a suit against the sureties; because as to that, the action of the Inferior Court is ministerial, and not judicial. *Stephens et al. vs. Crawford, Gov. &c.* 1 *Kelly*..... 578
44. The declaration and other original papers of file in the Clerk's office, may be used in evidence in the same Court to which they belong. *Peck vs. Land*. 2 *Kelly*..... 15

45. The Act of 1802, prohibiting the Judges of the Superior Courts from withholding any grant, deed, or other document, from the Jury, unless barred by the Act of Limitations, does not repeal the law of evidence as to execution of such papers, nor prevent the Judge from pronouncing upon their legal character. The only effect which it has, is to prevent them from withholding from the Jury, papers whose legal character is admitted or adjudged by the Court, and are legally proven. *Hester, Exr. vs. Young*. 2 *Kelly*..... 42
46. A testamentary paper cannot be read to the Jury in any case affecting the title to personalty, in a Court of Common Law, until it has passed the probate before the Ordinary. *Ibid*.
47. The newspaper itself, is the best evidence of any article which has been published in its columns. *Bond vs. The Central Bank*. 2 *Kelly*. 107
48. The plaintiff is not required to produce evidence to explain any alteration in the instrument sued on, where it is declared upon *as altered*, unless there is a plea of *non est factum*. *Tedlie vs. Dill*. 2 *Kelly*. 131
49. An exemplification of the record of a case, under the hand and seal of the Clerk, exhibiting, among other things, the *assignment* by the plaintiff of the *fi. fa.* is admissible to prove the transfer. *Napier vs. Neal*. 3 *Kelly*..... 300
50. It is not necessary to give notice of the first suit, in order to recover over against the party ultimately liable. With notice, the former judgment is conclusive; without it, *prima facie* evidence only, of liability. *Ibid*.
51. The Act of 1838, making the certificates of Notaries Public, evidence of the facts therein stated, not only make evidence (*prima facie*) of non-payment, but also of *notice*, when so stated in the certificate. *Walker et al. vs. Bank of Augusta*. 3 *Kelly*..... 492
52. If the certificate states that the notice was deposited in the P. O. addressed to the indorsers "at their respective places of abode:" *Held*, sufficient. *Ibid*.
53. In an action for contribution, the record of the entire proceedings, which is the basis of the suit, must be introduced, unless it appears from the testimony in the case, that the recovery was on contract. *Haupt vs. Adm'r. of Cope*. 4 *Ga.*..... 543
54. The recitals in an administrator's deed, of the order, advertisement, &c. are *prima facie* evidence of facts, until the contrary is shown. *Clements vs. Henderson*. 4 *Ga.*..... 148
55. A certified copy of the record of commissions from the Executive

- Office, is the highest and best evidence of the fact, that one who appears from his acts to have been a Justice of the Peace, in a given County, during a particular time, was not a Justice of the Peace during that time. *Fain vs. Gathright*. 5 Ga..... 6
56. The books of a corporation are admissible, to show the regularity and legality of their proceedings, but not to establish a right against third persons. *Hall et al. vs. Carey, Assignee*..... 239
57. Where a party relies upon title to personalty, acquired by the Act of Limitation of another State, the exemplification of such Act may be read in evidence under the general issue. *Wynn vs. Lee, Trustee*. 4 Ga..... 217
58. A deed to land sold by the Sheriff, under a Justice's Court *fi. fa* will be admitted in evidence, upon proof of the loss of the *fi. fa.* to levy and sale, and proof by presumption, the entry of "*nulla bona*" by the Constable was upon it. This case distinguished from *Hopkins & Burch*, 3 Kelly, 222. *Vaughn vs. Biggers*. 6 Ga..... 188
59. In an action of trover to recover a negro, by the administrator with the will annexed, *the will* is not competent evidence to show *title* in the testator at the time of his death, by his *declarations* therein, that he had *loaned* the negro to his son, through whom the defendants claimed, and who had had possession of the slave twelve months before the testator died. *Echols and Wife vs. Barrett*. 6 Ga..... 443
60. In an action for fraud and deceit in the sale of a slave, the bill of sale, although not described in the declaration, is admissible to prove the sale. *Dye vs. Wall*. 6 Ga..... 584
61. In a suit by a bank, the defendant having introduced the books of the bank in evidence: *Held*, that he cannot impeach the books as a whole, but may show that particular items in the books are wrong, and disprove them, and by mistake or fraud they have been improperly kept. *Merchant's Bank vs. Rawls, Adm'x, et al.* 7 Ga..... 191
62. Where a printed circular, produced by the defendants, under notice from the complainants, was offered in evidence by the latter, to prove that a certain joint stock company had represented to the public that they had been incorporated with a capital of \$600,000: *Held*, that it must first be proved that the defendants had issued and circulated the paper, before it could be read in evidence against them. *Berry et al vs. Matthews et al.* 7 Ga..... 457
63. To authorize a recovery upon shop books, where the entries are in the hand-writing of the party, the plaintiff, among other things, must prove by his customers that he kept correct books; and it is no compli-

ance with the rule, for the witnesses to state that they considered their accounts reasonable; admitting, at the same time, that they had never examined the items, and could not say that the services charged were actually rendered. *Bower vs. Smith.* 8 Ga..... 74

64. Before the books of the party can be admitted in evidence, they are to be submitted to the inspection of the Court, and if they do not appear to be a daily register of the business of the party, and to have been honestly and fairly kept, they are to be excluded. Explanatory evidence may be offered, and if the objections are *prima facie* accounted for, the books should be submitted to the Jury, letting the objection go, under the charge of the Court, to their *credit*, rather than to their competency. *Ibid.*
65. Books, *per se*, are not sufficient to charge the defendant with the debts and accounts of third persons. *Ibid.*
66. Where it appeared that by the law and usage of the Courts of Virginia, the Clerk's certificate that a will was duly admitted to probate and record would be sufficient evidence of that fact in that State: *Held*, that the same faith and credit should be given to the records and judicial proceedings of the State of Virginia, when offered in evidence in the Courts of this State, as they would have there received. *Settle vs. Alison and others.* 8 Ga..... 201
67. Where the records and judicial proceedings of the County Court of Mecklenberg County, in the State of Virginia, were offered in evidence, under the Act of Congress, Abram Keen certified that he was the presiding Magistrate of Mecklenberg County: *Held*, that the presiding Magistrate should have certified that he was the presiding Magistrate of the County Court of Mecklenberg County, from whence the record was taken. *Ibid.*
68. Where the subscribing witness to an instrument resides beyond the jurisdiction of the Court, the regular mode to prove its execution, is to prove the hand-writing of the witness; but where a receipt or other written instrument is more than thirty years old, its execution need not be proved to admit it in evidence, although the subscribing witness may be living. *Ibid.*
69. A decree in Chancery is evidence, not merely of the fact of its rendition, but also of all the consequences resulting therefrom. It may be given in proof against persons who were not parties to the bill, in support of the plaintiff's right or title to sue. *Hardwick vs. Hook, Receiver.* 8 Ga..... 354
70. The registration of a bond for titles to land, not being authorized by law, does not entitle it to be read in evidence without proof of its execu-

- tion. *Aliter*—if thirty years old, accompanied with proof of possession under it, or if produced pursuant to notice from the opposite party, he claiming an interest under it. *Beverly and another vs. Burke.* 9 Ga. 440
71. What is *color of title*? *Ibid.*
72. A copy deed established according to law, is to be taken in lieu of the original, for all purposes whatever. *Ibid.*
73. If the original deed was never recorded in the County where the land lies, the copy, unless registered, cannot be read in evidence, without proof of its execution. *Ibid.*
74. The fact that it was recorded on the *minutes* of the Superior Court, in the course of the proceeding instituted for its establishment, does not dispense with the statutory requirement of registration. *Ibid.*
75. The recitals in a deed, of the *fi. fa.* and seizure and sale of the property under it, are *prima facie* evidence of the facts. *Ellis vs. Lessee of Smith.* 10 Ga. 253
76. The ancient, fixed and universal rule is, that the attesting witnesses to a deed must be produced to prove any fact connected with the execution of the instrument, unless their absence is accounted for; and the fact that others may know more of the transaction, will not dispense with their testimony. *Ibid.*
77. The acknowledgment by the party himself that he executed the deed, or even his admission in answer to a bill filed for discovery, has been held not to dispense with the testimony of the subscribing witnesses. *Ibid.*
78. And the rule is the same, whether the acknowledgment is offered in evidence against the party himself who made it, or a third person. *Ibid.*
79. If a party wishes to introduce a copy deed, it will be sufficient for him to swear that the original, in his belief, is lost or destroyed, and that it is not in his custody, power or control. *Ratteree vs. Nelson.* 10 Ga. 439
- See *Guardian and Ward*, II. 1, 13.

III. INTERROGATORIES: DEPOSITIONS: DISCOVERY AT LAW.

1. Where cross-interrogatories have relation to the subject-matter of the

- direct examination, and the commission is returned with the cross-interrogatories, or any one of them, unanswered, the whole of the testimony ought to be withheld from the Jury. *Admr's of McClesky vs. Ledbetter.* 1 *Kelly*..... 554
2. A deposition, that "there was a gift" from A to B, without stating the manner and form of the gift, is inadmissible. *Carter et ux. vs. Buchanan.* 3 *Kelly*..... 521
3. Interrogatories taken out under the Act of 1811, cannot be given in evidence for the defendant, in a *criminal case*. *McLane vs. The State.* 4 *Ga.*..... 335
4. Interrogatories in a civil case will be rejected, unless it appears that the commission issued upon some one of the grounds provided in the Statute of the State. *Craft vs. Jackson.* 4 *Ga.*..... 360
5. Whether, under the Judiciary Act of 1799, it is not the duty of the Clerk to name the commissioners and insert their names in the commission, before issuing it? *Quere.* *Tillinghast, Stark & Co. vs. Walton.* 5 *Ga.*..... 335
6. If the relation of the commissioner to either party is such as to warrant the inference that he may act under a bias, he is not competent. *Ibid.*
7. The clerk of the attorney who sues out the commission, is an incompetent commissioner. *Ibid.*
8. A student at law, in the office of the counsel in the cause, is an incompetent commissioner. *Glanton vs. Griggs.* 5 *Ga.*..... 424
9. When the answer of a witness is written without punctuation, the best rule is to read it so as to make sense of each and every part—to connect such parts as will be, when joined together, susceptible of an intelligible meaning; and if a proposition or statement becomes absurd, by connection, to let it stand as an independent statement. *Lessee of Vaughn vs. Biggers.* 6 *Ga.*..... 138
10. The depositions of a witness, taken on the ground of non-residence, cannot be read on the trial, if the witness has notoriously resided within the County where the cause is pending for some time previously, and his attendance can be coerced by subpoena. *Hammock vs. Mc-Bride.* 6 *Ga.*..... 178
11. Under the Act of 1847, to compel discovery at Common Law, the party to whom interrogatories are propounded, must make just such answers as he would be required to do on a bill of discovery. *Thompson vs. Mapp.* 6 *Ga.*..... 260

12. Where a witness is examined by commission, the party cross-examining may withdraw his cross-questions if he chooses, the other party having the liberty to read them at his option. *Williams vs. Kelsey & Halsted*. 6 Ga..... 365
13. On a motion to arrest the reading of the depositions of an agent, on the ground that his authority was in writing: *Held*, that this is a fact for the finding of the Court. *Crenshaw vs. Jackson*. 6 Ga..... 509
14. Where the cross-questions in interrogatories grow out of the direct examination, and are not fully answered, they will be rejected. *Williams vs. Turner and another*. 7 Ga..... 348
15. To entitle a party to the answers of his adversary, under the Act of 1847, it is only necessary to show that they will be *material* evidence in the cause; he need not state that they are indispensable. *Marshall vs. Riley*. 7 Ga..... 367
16. The application for the answers of the adverse party, must be based upon the affidavit of the person applying, or some showing equivalent thereto, which must be recited in the order of the Court, or appear of record. *Ibid*.
17. No person can be compelled to answer interrogatories which would subject him to a penalty or forfeiture, or punishment for crime, or have a *tendency thereto*. *Ibid*.
18. If a party submits to answer illegal questions *under protest*, he waives no right, but may insist on his objections at the hearing; nor can the contents of incompetent testimony, extorted by authority of law, be proven by third persons, who have seen and read it. *Ibid*.
19. Interrogatories taken in one case, in order to be used in another, must be between the same parties and relate to the same subject-matter; and then will be introduced, only from the necessity of the case; the witness being dead, or beyond the jurisdiction of the Court. *Crawford, Gov. &c. vs. Word et al*. 7 Ga..... 445
20. Cross-interrogatories are sufficiently answered, when the witness answers them according to a reasonable understanding of their meaning and object. *Thomas, Adm'r, vs. Kinsey*. 8 Ga..... 421
21. Interrogatories which have been read on a previous trial, without exception to their execution, cannot be excepted to at a subsequent trial. *Ibid*.
22. Where it appeared, from the return of the commissioners, that questions were put to the witness and answered, by a person purporting

to be the attorney of one of the parties, at the time of execution, the other party not being present: *Held*, that the interrogatories are defectively executed, and must be rejected. *Ibid*.

23. Where a witness who resides in the County where the suit is pending, and was in attendance under a subpoena, on the first day of the Court, and on that day his testimony was taken by commission, and who, on the day of trial, was unable to attend the Court from bodily indisposition: *Held*, that the testimony could not be read as that of a witness who was unable to attend the Court from age, or bodily infirmity, as contemplated by the Act of 1838. *Brooks vs. Ashburn.* 9 Ga..... 297
24. The 47th Common Law Rule of Practice, requiring testimony taken by commission, to be communicated to the adverse party before the cause is called for trial, is *directory* merely. *Beverly vs. Burke.* 9 Ga. 440
25. Answers to interrogatories procured under the Act of 1847, when responsive to the questions propounded, are conclusive, unless contradicted by two witnesses, or one witness and corroborating circumstances. *Zeigler vs. Scott, Adm'r.* 10 Ga..... 289
26. The party cannot set up in his answer, an independent contract not elicited by the questions asked. *Ibid.*
27. The defendant is not bound to pay up the money loaned, and legal interest, before he can read the plaintiff's answers. *Ibid.*
28. The depositions of a witness who was incompetent at the time he was sworn, on the ground of interest, cannot be purged by removing the disqualification on the trial. *Ellis vs. Lessee of Smith.* 10 Ga. 253

IV. WITNESSES: OPINIONS, EXAMINATION, &c.

1. It is not the conclusion at which a witness arrives, that constitutes evidence in a cause. He must state facts, and let the Jury draw their own conclusions. *Bank of South Carolina vs. Brown.* *Dudley* 64
2. It is competent for a witness to refresh his memory, by resorting to a memorandum which he made of a fact, and if he can then speak to the fact, from his own recollection, it will be good evidence; but if after seeing the memorandum, he cannot recollect the fact, the original memorandum itself must be produced. *Ibid.*
3. When a person is manifestly interested in the event of a suit, he is incompetent as a witness. *Miller vs. Hale, et al. Ex'rs.* *Dudley*.... 119

4. The payee of a promissory note, is a competent witness to prove its consideration, under some circumstances. *Slack vs. Moss. Dudley.* 161
5. A sued B, as executor *de son tort* of C, and offered C's widow to prove the intermeddling. *Held*, that she was interested and incompetent as a witness. *Anderson vs. Primrose, Ex'r. Dudley.*..... 217
6. It is a general rule, in claim cases, and considered the safest that can be adopted, that defendants in *fi. fa.* cannot be witnesses. *Edwards vs. Musgrove. Dudley.*..... 220
7. Where an agent had lost the money of his principal at faro, the agent is an incompetent witness until released. The official attestation of the release by a Notary, is sufficient proof to admit it in evidence. *Allen vs. Lacy et al. Dudley.*..... 81
8. A party to a negotiable instrument, may testify to facts which do not prove it to have been originally void, as payment, &c. *Wendell vs. George. R. M. Charl.* 51. See also, *Ga. Dec. part II.*..... 184
9. If the witness can neither gain nor lose by the event of the suit, and the verdict in the case cannot be given in evidence, either for or against him, he is competent to testify All other objections go to his credibility. *Ibid.*
10. An accessory jointly indicted with the principal in a felony, may be a witness for the State, but *it seems* not for the prisoner. *The State vs. Calvin. R. M. Charl.*..... 151
11. It is competent for a person not being a physician, to testify to the general health of a person. *Ga. Dec. part I.*..... 77
12. In a Justice's Court, a defendant is not a competent witness for himself. *Ga. Dec. part II.*..... 148-164
13. He can deny the plaintiff's demand on his own oath, only when the plaintiff proves his demand by affidavit, not appearing in Court. *Ibid.*..... 150
14. A surety on appeal may be discharged and others substituted, with a view to render him a competent witness on the part of the appellant. *Davis et al. vs. Anderson et al. 1 Kelly.*..... 192
15. By the Common Law of England, all *sane* persons are competent witnesses, unless *interested or infamous.* *Winkler vs. Scudder. 1 Kelly.* 182
16. The maker of a note, who is released, is a competent witness to

prove usury in its consideration, in a suit by an indorsee against an indorser. *Ibid.*

17. In order to impeach a witness by showing that he has made contradictory statements, it is not necessary that he absolutely deny the declaration imputed to him. It may be done, if he says "he does not recollect." *Sealy vs. The State.* 1 *Kelly*..... 218
18. Witnesses who testify as to what they saw respecting a transaction at night and by starlight, aided by lamps upon the surrounding buildings, cannot be impeached by persons who propose to prove that they have made experiments on other nights between the same hours, and with the same degree of light, and were unable to discern objects accurately. *Ibid.*
19. In a suit against the surety alone, the principal is interested to the extent of the costs, and therefore, is not a competent witness for the surety, unless released from liability as to such costs. *Rackley vs. Sanders and another.* 1 *Kelly* 258
20. An indorser is not competent in a suit by client *vs.* attorney, for money collected from principal, unless released. *Nisbet vs. Lawson.* 1 *Kelly*..... 282
21. The true test of the interest of a witness is, will he gain or lose by the *direct legal operation* of the judgment, or will the *record be legal evidence* for, or against him, in some other suit. *Bailey vs. Lumpkin.* 1 *Kelly*..... 403
22. An accomplice not on trial, is a competent witness for the prisoner. *Jones vs. The State.* 1 *Kelly*..... 616
23. When the question is, whether a homicide be felonious or justifiable, the opinion of a witness as to the intention of the deceased in approaching the prisoner, is not evidence—*aliter*, as to any information which the witness may have communicated, whether true or false. *Hudgins vs. The State.* 2 *Kelly*..... 181
24. A witness who has no interest in the subject of the suit, but who is liable for the *costs* only, is disqualified from testifying, the law looking to the *nature* and not the *quantum* of the interest. *Vason, Ex'r. vs. The Merchant's Bank.* 2 *Kelly*..... 142
25. The true test of the interest of a witness is, whether he will gain or lose by the direct and legal operation and effect of the judgment, or whether the record will be evidence for or against him, in some other action. It must be a *present, certain, and vested* interest, and not *uncertain, remote or contingent.* *Howard vs. Brown, Adm'r.* 3 *Kelly.* 527

26. If the interest be of a *doubtful* nature, it goes to his credit. *Ibid.*
See also, *Adams vs. Barrett.* 3 *Kelly*..... 280
27. A witness is always presumed to be competent, and the burden of proof to show his incompetency, is on the objecting party. *Adams vs. Barrett.* 3 *Kelly*..... 280
28. Where the witness entered into a covenant to guaranty and protect the title to certain land against mortgages, &c.: *Held*, that it was incumbent on the party objecting to the competency of the witness to show *affirmatively*, that there was in existence at the time of the trial, some such lien or incumbrance, in order to exclude the witness. *Ibid.*
29. In an action for deceit, by A against B, for representations concerning the credit of C: *Held*, that C was a competent witness. *Young vs. Hall.* 4 *Ga.*..... 95
30. A witness, who testifies, generally, that a party did *not* receive value for the transfer of a promissory note, without limitation, as to his knowledge, or as to time or place, is a *negative* witness, and is not to be believed in preference to a witness who swears *affirmatively*, that such party did receive value. *Mathews vs. Poythress.* 4 *Ga.*..... 287
31. A witness liable to a third person, who is liable to the party calling him, is a competent witness. *Ibid.*
32. A. brings ejectment for land, and holds B's deed as part of his claim of title. B is offered as a witness for defendant, and upon his *voir dire* states, that he never made the deed under which A claims; that he has given his bond for titles to the defendant, and holds his notes, and had been notified by him to appear and defend: *Held*, that B was an incompetent witness. *Fain vs. Gathright.* 5 *Ga.*..... 6
33. A co-defendant to a bill in Equity, who is made so for mere form's sake, is a competent witness, if no decree be prayed against him. *Ragan and Key vs. Echols.* 5 *Ga.*..... 71
34. The words of a witness are to be taken in their ordinary meaning; and when testifying to a fact within his knowledge, the evidence may go to the Jury, notwithstanding he fails to affirm positively that it is, or is not so. *Hammock vs. McBride.* 6 *Ga.*..... 178
35. A witness who is liable to an action by the party for whom he is called, in case that party should not recover, is incompetent to testify, without a release. *Ray, Adm'r, vs. The Justices, &c. Macon County.* 6 *Ga.*..... 303

36. Where money was paid by A to B, who said he paid it for C, and by his direction: *Held*, that A was a competent witness to prove to whom the money belonged, and by whose direction he paid it to B; and that his declarations were not admissible in evidence for that purpose, made at the time of such payment, in favor of his alleged principal. If admissible as a part of the *res gestæ*, his agency must first be shown. *Williams vs. Kelsey & Halsted*. 365
37. That a witness may refer to a written instrument, memorandum, or to any entry in his books, to refresh or assist his memory, is a well-established rule of evidence; and although the witness has no recollection of the fact, independent of the entry in his books, but will testify as to his uniform practice to make his entries truly, and at the time of each transaction, and will further state that from such practice he has *no doubt* the entry in question is correct, his testimony is admissible. *Ibid*.
38. But where the witness states that *certain facts seem to have transpired between the parties, from his docket*, without adding the legal sanction of the oath of the witness to the truth thereof, from his recollection or otherwise: *Held*, not to be admissible. *Ibid*.
39. The Cashier of the Central Bank is not a competent witness to prove the contents of the books of the bank, not within his own knowledge, under its charter, in cases where the bank is not a party. *Ibid*.
40. Under the peculiar provisions of our Statute, the defendant in execution is not a competent witness, nor can his declarations be given in evidence in favor of the claimant. *Ibid*.
41. It is error in the Court to discredit the testimony of *relatives*, as such; relationship being a circumstance only, from which the Jury may infer bias. *Potts vs. House, Ex'r*. 6 Ga. 324
42. The opinions of physicians as to the sanity of the testator are admissible, whether founded on the symptoms and circumstances, as coming within their own observation, or as testified to by others. *Ibid*.
43. The opinions of the subscribing witnesses to a will, as to the sanity of the testator, are admissible, without stating the facts on which they are founded. *Ibid*.
44. The *mere* opinions of other witnesses are not admissible, unless accompanied with the facts on which they are founded; but having stated the appearance, conduct, conversation, or other particular facts, from which the state of testator's mind may be inferred, they are at liberty to express their belief or opinion, as the result of those facts. *Ibid*.

45. As a general proposition, *affirmative* testimony should outweigh *negative*. This rule, however, does not apply where some of the witnesses swear that the testator *could measure corn, calculate interest, &c.* and others that he could not. The testimony in both cases, is of the same character. *Ibid.*
46. The opinion of a witness may be given in evidence as to the insolvency of a party, provided it is accompanied by the facts upon which the opinion is founded. *Crawford, Gov. &c. vs. Andrews and others.* 6 Ga..... 244
47. A witness cannot be discredited by proof of statements made out of Court, irreconcilable with his testimony, until he has first been examined as to the time, place, person and circumstances involved in the statements proposed to be proved. *Williams vs. Turner.* 7 Ga.. 348
48. One of the methods of impeaching a witness, is by proving that he has made statements out of Court, contrary to what he has testified at the trial. But before this can be done, the witness must be first asked, himself, upon cross-examination or upon a direct examination, at the instance of the party who seeks to bring his credit into question, whether or no he has said or declared that which is intended to be proved. *Johnson vs. Kinsey.* 7 Ga..... 428
49. Where a party seeks to impeach the testimony of a witness, on the ground that he has made contradictory statements, it is incumbent on the party to announce, when so required, the statement he seeks to contradict, that the Court may judge of its materiality. *Williams et al. vs. Chapman.* 7 Ga..... 467
50. The rule requiring to lay the foundation for impeaching a witness, by first inquiring of the witness whether or not he has made the statements, does not apply where the evidence to impeach the witness is his sworn depositions, previously taken in the same cause. *Ibid.*
51. The opinion of a witness, (other than the subscribing witness, or a physician,) is not competent to prove the insanity of a grantor, unless the facts and circumstances are stated, on which it is founded. *Dicken vs. Johnson.* 7 Ga..... 484
52. In an action by B against C, for money deposited with C by A, as the agent of B: *Held,* that A is not a competent witness for the plaintiff to prove the liability of C. *Montgomery, Adm'r, &c. vs. Evans.* 8 Ga..... 178
53. A naked trustee is a competent witness in an action to which he is not a party. *Hardwick vs. Hook, Receiver.* 8 Ga..... 354
54. Upon an issue founded on an affidavit of illegality, filed by an ad-

- ministrator *de bonis non*, with the will annexed, to a general judgment against the precedent executor to the will, which was levied on the property of the estate in the hands of the administrator: *Held*, that legatees, under the will, who have been paid their legacies, are competent witnesses when called for the administrator. *Johnson, Adm'r, vs. Lewis.* 8 Ga..... 460
55. When the dispute is as to localities, a diagram drawn in accordance with the testimony of a witness, may be submitted to the Jury, without having been first exhibited to the witness, whose evidence it contradicts. *Bishop vs. The State.* 9 Ga..... 121
56. In an action against the surety to a note to which the defence was usury: *Held*, that the maker, upon being released from all liability, was a competent witness for the defendant. *Barnett et al. vs. Troutman.* 9 Ga..... 36
57. A witness may be interrogated as to the state of his feelings towards a party, in order to show the bias under which he testifies. It is not competent to inquire into the cause of his hostility. *Bishop vs. The State.* 9 Ga..... 121
58. Where a witness had been security on an administration bond for a short time, and was discharged from all future liability by the Court of Ordinary: *Held*, that such witness was competent in a suit by persons claiming to be distributees of the intestate against the administratrix, to prove in behalf of such administratrix, that the complainants were not entitled to any share of the estate; and that the record of the judgment against such administratrix, would not be even *prima facie* evidence of the liability of such discharged surety, in a suit on the administration bond, there being no allegation of *mal-administration*. *Beall vs. Beall, Adm'r.* 10 Ga..... 342
59. A witness speaking of a contract between two persons, which he heard, said "the *understanding* was, that Davis should pay himself out of the said amount, for his trouble and expense. The balance to go to his daughter, Frances:" *Held*, to be admissible evidence. *Moody and Wife vs. Davis.* 10 Ga..... 403
60. It is an elementary principle of the law of evidence, that the understanding and opinion of witnesses are not to be received, except in matters of science and a few special cases resting upon peculiar circumstances. *Berry vs. The State.* 10 Ga..... 511
61. It is the business of the witness to state facts, and it is the province of the Jury, under the direction of the Court, to draw such information and conclusions from these facts, as in their judgment they will warrant. *Ibid.*

62. In a variety of cases, witnesses are permitted to give their opinion in evidence, in connection with the facts upon which it is formed. *Ibid.*
63. In cases of insanity, the rule of allowing a witness to express his belief, when coupled with the facts upon which it is founded, is now generally, if not universally admitted. *Ibid.*
64. Is it possible to draw a line of demarkation, and to state definitely in what class or classes of cases, the opinion of the witness may be expressed, and when it must be excluded? *Quere. Ibid.*
65. Where the question at issue is one of *opinion merely*—as that of sanity or insanity, solvency or insolvency, personal identity, handwriting, age, &c.—in all such cases it should be allowable for the witness to give his opinion, coupled with the facts from which it is formed. *Ibid.*
66. Where *matters of fact* are to be tried—as contracts, crimes, trespasses on the case, torts, and such like—the testimony should be restricted to words and facts only. *Ibid.*
67. Looking to the *nature of the investigation*, is not the rule founded in good sense and the nature of things? *Quere. Ibid.*

V. PAROL EVIDENCE: ADMISSIBILITY, &c.: HEREIN OF SECONDARY EVIDENCE.

1. Notice must be given to produce an original paper proved to be in the possession of the adverse party, before secondary evidence can be received of its contents. *Bank of So. Ca. vs. Brown. Dudley.....* 64
2. Where secondary evidence is let in, it is subject to the same rule as primary evidence. *Ibid.* See, also, *Ga. Decisions, part II.....* 205
3. Parol evidence, which denies or varies a record, is inadmissible. *Crockett vs. Routon. Dudley.....* 255
4. Parol evidence is admissible to raise a latent ambiguity in a grant, and then to explain it. *Lessee of Meadows vs. Barry. Ga. Decisions, part I.....* 80
5. If there be a mistake in the christian name of the grantee, it may be explained by parol evidence. *Ibid.*
6. An express trust as to personalty, may be proved by parol. *Martin et al. vs. Greer et al. Ga. Decisions, part I.....* 109

7. Parol evidence is inadmissible to vary or add to a record. *Stell, Guardian, vs. Glass*. 1 *Kelly*..... 485
8. It is admissible to rebut an allegation that an order of the Court of Ordinary was fraudulently procured. *Ibid*.
9. Parol evidence is inadmissible, to contradict or vary the terms of a written agreement. *Rogers vs. Atkinson*. 1 *Kelly*..... 18
10. When the contract is reduced to writing, conversations or stipulations anterior to or cotemporaneous with the written instrument, are supposed to be merged in it, and are not allowed to be proved by oral testimony. *Ibid*.
11. If it were not necessary in the first instance to have the contract reduced to writing, parol evidence may be received of conversations, and circumstances *subsequent* to the time of making the agreement, to show that the parties, upon sufficient consideration, consented afterwards to vary the contract or add some new stipulation. *Ibid*.
12. Parol evidence is admissible to explain *latent* ambiguities, to rebut an equity and to contradict a receipt. *Ibid*.
13. Parol evidence admissible, to show whether Justices of the Inferior Court (signing a note with the addition of the initials, J. I. C.) made the contract individually or in their official capacity. *Ghent et al. vs. Adams*. 2 *Kelly*..... 217
14. Trusts in personalty may be created and proven by parol. *Kirkpatrick, Guardian, vs. Davison*. 2 *Kelly*..... 299
15. Parol evidence is inadmissible to prove the cause of taking a recognizance. The offence should be specified in the recognizance itself. *Nicholson vs. The State*. 2 *Kelly*..... 366
16. Where a note was given to a teacher by the trustees, saying: "We the trustees of Oak Chumpna Academy, promise, &c." Held, that parol evidence was admissible to show in what character the contract was made, whether as individuals, or as the agents of others. *Cleveland vs. Stewart et al*. 3 *Kelly*..... 297
17. A receipt for money may be explained by parol, when there has been any imposition practised in obtaining it, and any facts may be proved at Law, which if true would entitle the party to relief in Equity. *Tarver vs. Rankin*. 3 *Kelly*..... 215
18. Parol evidence inadmissible, to show that a note, *absolute and unconditional* on its face, and indorsed in *blank*, was intended to be negoti-

- ated at a chartered bank, for the purpose of showing that the indorser, under the Act of 1826, was entitled to notice. *Stubbs vs. Goodall*. 4 Ga..... 106
19. Where a note payable to B, is indorsed at the time of its execution by C, parol evidence is inadmissible to show that C agreed to be liable as original promissor. *Collins vs. Everett*. 4 Ga..... 260
20. Parol evidence is inadmissible, to prove any contract different from the written agreement, unless from *fraud, accident or mistake*, the instrument fails to speak the intention of the parties. *Wynn, Shannon & Co. vs. Cox*. 5 Ga..... 373
21. Parol evidence is admissible in a suit by the plaintiff against the defendants, as joint and several makers of a note, to show that one was surety only to the paper—such fact not appearing on the face of the note itself. *Bank of St. Marys vs. Mumford & Tyson*. 6 Ga..... 44
22. Where a note is made by A & B, and they say *I promise to pay to the order of B*, it is a joint and several note. Suit being brought upon this note by the holder against B, as maker: *Held*, that B is an original promissor, and that parol evidence is inadmissible to show that B signed the note as surety only; and thereby let him in to the benefit of the Act authorizing sureties to give notice to holders of notes, &c. to proceed to collect the same. *By Judge NISBET, dissenting. Ibid.*
23. Parol evidence is admissible to establish the *fact* of the sale of personal property, and the *time* when it was made, notwithstanding the contract was reduced to writing. But the document itself is the best evidence of the *terms* of the agreement. *Thompson vs. Mapp*. 6 Ga. 260
24. If the subscribing witnesses to a deed reside without the State, secondary evidence may be resorted to, to prove its execution. *Harris vs. Cameron*. 6 Ga..... 382
25. To admit secondary evidence of the contents of a paper, its existence must be proven, and its destruction or loss. *Doe ex dem. Vaughn vs. Biggers*. 6 Ga..... 186
26. When the loss of a paper is relied on, the law does not require positive proof of loss; but proof sufficient to raise a reasonable presumption. *Ibid.*
27. It is the province of the Court to determine whether the loss is sufficiently proven to admit secondary evidence. *Ibid.*
28. Before secondary evidence will be admitted, the party will be re-

quired to show that he has exhausted, in a *reasonable degree*, all the *sources of information and means of discovery* which the nature of the case suggests, and which were accessible to him. *Ibid.*

29. Where a paper has been traced into the possession of a person, reasonable diligence must be used to procure the testimony of that person before secondary evidence is admissible. *Ibid.*
30. Where the person is without the jurisdiction of the Court, may not secondary evidence be admitted? *Query. Ibid.*
31. The rule as to the admission of secondary evidence, is this: where there is no ground for presuming that better secondary evidence exists, any proof is received which is admissible by the other rules of law, unless the objecting party can show that better evidence was previously known to the other party, and might have been produced. *Ibid.*
32. Presumption of the loss of a paper may arise from lapse of time, which will be taken into account, in determining the question of diligence in the search. *Ibid.*
33. A executed his bond to B, conditioned to make him a title to a tract of land therein described, whenever the litigation then pending respecting it, should terminate. B brought suit on the bond, alleging forfeiture thereof, in which there was a verdict and judgment for the defendant, upon the "general issue." Held, that the former recovery was no bar to another action, and that parol evidence was admissible to show that, on the first trial, no other issue was submitted to the Jury, save only the fact as to the pendency of the litigation referred to in the bond, and that the testimony was restricted exclusively to that point. *Ezzell vs. Maltbie & Winn, Ex'rs. 6 Ga. 495*
34. In order to prove the advertisement of a Sheriff's sale in one of the public gazettes of this State, as required by law, the production of the newspaper in which the advertisement was published, is the best evidence; but if that cannot be done, in the exercise of ordinary diligence, then a copy, taken from the paper of file in the publisher's office, verified by the oath of the publisher, is admissible. *Schley vs. Lyon and another, Trustees. 6 Ga. 530*
35. By the 4th section of the Statute of Frauds, the promise to answer for the debt of another person, must not only be in writing, but also the *consideration* of the agreement. Parol evidence is inadmissible to prove a consideration *extrinsic* of the written agreement. *Henderson vs. Johnson. 6 Ga. 390. Wain vs. Walters. considered and approved. Ibid.*

36. S, an attorney, gave to C, a receipt for a note to collect, in which the note is described, but an indorsement by R omitted: *Held*, in an action by C against S, it was competent to prove the indorsement by parol. *Cox vs. Sullivan*. 7 Ga..... 144
37. Parol evidence is inadmissible to prove the contents of an execution and transfer in writing, where both facts are material to the issue. *Flournoy vs. Newton*. 8 Ga..... 308
38. Where, from the inquiry which has been made, it is probable that a book of original entries has been lost or destroyed, and the party swears that it is not in his power, custody or control, secondary evidence is admissible. *Lane vs. Morris*. 8 Ga..... 468
39. The rule requiring the production of the best evidence of which the nature of the case is susceptible, is essential to the true administration of justice. *Fitzgerald vs. Adams, &c*. 9 Ga..... 471
40. The cases which most frequently call for the application of this rule are those which relate to the substitution of *oral* for *written* evidence. *Ibid*.
41. In all cases where the Law requires that the evidence of the transaction should be in writing, no other proof can be substituted, so long as the writing exists and is in the power of the party. *Ibid*.
42. No secondary evidence will be allowed of the original summons to a Justices' Court, and the return of the Constable thereon, until diligent search has been made for this primary proof. *Ibid*.
43. Upon the question of diligence in the search for written documents, so as to entitle the party to introduce secondary evidence, he must show that he has in good faith exhausted all the sources of information and means of discovery which the nature of the case would naturally suggest, and which are accessible to him. *Ellis vs. Lessee of Smith*. 10 Ga..... 253
44. The exceptions to the general rule, requiring the testimony of the attesting witnesses, stated. *Ibid*.
45. If a party wishes to introduce a copy deed in evidence, it will be a sufficient compliance with the rule, to swear that the original deed, in his belief, is lost or destroyed, and that it is not in his custody, power or control. *Ratteree vs. Nelson*. 10 Ga..... 439
- See *Principal and Agent*, III. 5.

VI. BURDEN OF PROOF.

1. In an action upon a bond conditioned to pay a debt by instalments, or to pay rent, the simple production of the bond, on the part of the plaintiff, is sufficient to put the defendant upon the proof of the performance of the condition; and the same principle is applicable to a bond conditioned to deliver, on a day certain, deeds or muniments of title. *Stewart vs. Grimes et al. Dudley*..... 209
2. The lessor of the plaintiff need not produce evidence of the identity of the person under whom he claims. A grant or deed to a person of that name, makes out a presumptive case, and casts the onus on the opposite party. *Lessee of Terrell vs. Deane et al. Ga. Dec. part II.*..... 140
3. The returns of an administrator, executor, or guardian, are only *prima facie* evidence in their favor, and may be impeached, the burden of proof being on the party impeaching them. *Brown vs. Wright. 5 Ga.*..... 29
4. Where there has been an improper separation of the Jury, during the trial, the presumption is, that it is hurtful to the prisoner; and the *onus* is on the State to show that it was not. *Monroe vs. The State. 5 Ga.*..... 85
5. Where property is levied on and claimed under a sale under foreclosure of a mortgage: *Held*, that the judgment of foreclosure is *prima facie* evidence of indebtedness, and casts the burden on the plaintiff in *fi. fa.* of showing a want of consideration in the mortgage. *Williams vs. Kelsey & Halsted. 6 Ga.*..... 365
6. Proof of the possession by defendant in *fi. fa.* at the time or subsequent to the date of the judgment, of a slave of the same name, sex and age with the slave levied on: *Held*, sufficient to cast the *onus* on the claimant. *Deloach & Wilcoxson vs. Myrick. 6 Ga.*..... 410
7. When a grantor goes into Chancery to avoid his own deed, on the ground of insanity, the burden is upon him to prove it at the time the deed was executed, the law presuming sanity. But if *habitual* insanity is proven previous to the execution of the deed, the presumption of law is, that it continues to the time when the deed was executed; and the burden of proving sanity, at the making of the deed, is devolved upon the other side. *Dieken vs. Johnson. 7 Ga.*..... 484
8. A purchaser at Sheriff's sale has only to show his deed, the execution under which the land was sold, and prove title in the defendant,

or possession since the rendition of the judgment, and the *onus probandi* is cast upon the opposite party. *Whatley vs. Lessee of Newson.* 10 Ga..... 74

See *Insanity. I.*

VII. HEARSAY: AND HEREIN OF THE SAYINGS OF SLAVES.

1. Hearsay evidence is not admissible to prove age. *Roe vs. Lessee of Neal. Dudley.*..... 168
2. The sayings of a sick negro to her physician, cannot be given in evidence, except as to the disease with which she is afflicted at the time. *Brown vs. Lester. Ga. Decisions, part I.*..... 77
3. In an action for deceit, by A against B, for representations in a letter concerning C, declarations of B to C, at the time the letter was written, are inadmissible, unless communicated to plaintiff. *Young vs. Hall. 4 Ga.*..... 95
4. It is not competent to prove insanity by the reputation of the neighborhood. *Foster vs. Brooks, Adm'r. 6 Ga.*..... 287
5. An ancient boundary, corner or station tree, cannot, generally, be proved, otherwise than by reputation—consequently, hearsay evidence is admissible for this purpose, from the necessity of the case. It is not the best testimony, however, to prove the identity of a tract of land; there being higher evidence of the fact in the power of the party. *Martin vs. Atkinson. 7 Ga.*..... 228
6. When the value of depreciated bills, at a particular time, is to be proven, the proof should apply, with reasonable certainty, to that time, and hearsay cannot be admitted to prove their value. *Bethune vs. McCleary. 8 Ga.*..... 114
7. The sayings of an agent, after his actings as agent, are not competent to prove his agency. *Colquitt vs. Thomas et al. 8 Ga.*..... 258
8. The sayings of an attorney, who has sold a note belonging to his client, without authority, relative to the title to the note, not made at the time of the sale, are inadmissible in a suit between the purchaser and the true owner of the note. *Thomas, Adm'r, vs. Kinsey. 8 Ga.*.. 421
9. Hearsay evidence admissible to prove birth and pedigree, but inadmissible to create or destroy title to property. *Carter and Wife vs. Buchanan. 9 Ga.*..... 539
10. On the trial of an indictment against a free white citizen, the State

may give in evidence the confessions of a negro, even when extorted by the pain of punishment, provided they are proved by a white person, not as independent testimony, but as an inducement and an illustration of what was said and done by the accused—he being present, consenting that the negro should tell all he knew. *Berry vs. The State.* 10 Ga..... 511

VIII. ADMISSIONS.

1. It is well settled that no advantage shall be taken of admissions made to secure one's peace, or in the way of a compromise; and if an acknowledgment and promise for this purpose be replied to a plea of the Statute of Limitations, the evidence will be rejected. *Hicks & Lord vs. Thomas. Dudley*..... 218
2. In claim cases, the admissions of the defendant in *fi. fa.* before suit, may be given in evidence to sustain the title of the claimant. *Jones & Co. vs. Dally. Ga. Dec. part I.*..... 44
3. In an action upon a Sheriff's bond against his sureties, his admissions are *prima facie* evidence to charge them, unless made fraudulently or by mistake, or having relation to money, the payment of which is not guarantied by the bond. *Stephens et al. vs. Crawford, Gov. 1 Kelly.* 578
4. Where one, through a mistake of the law, acknowledges himself under an obligation which the law will not impose, he shall not be bound thereby. *Solomon vs. Solomon, Ex'r. 2 Kelly.*..... 30
5. The admissions of one member of a firm, who is not a party to the suit, when the Court is satisfied that the partnership has been established, may be given in evidence to charge the other members. *McCutchin vs. Bankston. 2 Kelly.*..... 245
6. The admissions of a third person, from whom the title emanates, which affects his interest, made whilst in possession, or before he parts with the title, are admissible in evidence against all who claim under him. *Carter and Wife vs. Buchanan. 3 Kelly.*..... 517
7. Statements made by a third person, in the presence of a party, and not contradicted, are admitted with great circumspection and caution, but only when the party adducing the evidence first proves that the person to whom the statements were made, assented to them, either expressly or by his silence. *Ibid.*
3. When A is in possession of property and about to make his will, and inquires of B, "what shall I do with Jenny? (a slave in his possession,) and B answers, "you can do nothing with Jenny, because I have given her

to your daughter Esther :’ Held, that both the question and the answer should be admitted, that the Jury may judge of the intention of A, in asking the question. *Ibid.*

9. Offers of compromise, with a view to settle or prevent litigation, are inadmissible; but an independent acknowledgment of a fact, may be received, although made pending a treaty for the amicable adjustment of a controversy. *The Mayor, &c. vs. Howard.* 6 Ga..... 213
10. The declarations of a party, while in the possession of property, as to the ownership, when against his interest, may be given in evidence against one who subsequently acquires a title from the declarant. *Maxwell vs. Harrison.* 3 Ga..... 61
11. The admissions of a party, made under oath as a witness, or on a voluntary affidavit, may be given in evidence against him, in a suit in which he is a party. *Ibid.*
12. The declarations of a vendor, who has parted with the title to the property, are illegal when sought to be given in evidence against his vendee, unless it clearly appears such declarations were made while he was the owner of, or in possession of the property, at the time the declarations were made. *Settle vs. Alison et al.* 3 Ga..... 201
13. The answer of one co-partner to a bill in Equity, filed against the co-partnership, which contains admissions against the interests of the company, although not filed as an answer in the cause, may be read in evidence, as a *written admission*, on due proof of its execution. *Dennis et al. vs. Ray.* 9 Ga..... 449
14. Where a bill charges a fraudulent sale and purchase under execution of complainant's property by defendant, proof of admissions by complainant, that the sale was made in pursuance of an agreement between himself and defendant, is admissible. *Peacock vs. Terry.* 9 Ga..... 137
15. Confessions extorted by hope or fear cannot be given in evidence against the prisoner or any body else. *Berry vs. The State.* 10 Ga.. 511
16. The admissions of a party, which are to be inferred from his acquiescence in the verbal statements of others, made in his presence, ought to be regarded with great caution, unless the evidence be of such direct declarations, and of that kind which naturally calls for a *contradiction*; or some assertion made to the party with respect to his rights, which by his silence he acquiesces in, it ought not to be received at all. *Rolfe vs. Rolfe.* 10 Ga..... 143

IX. EVIDENCE ON FORMER TRIAL, &c.

1. Testimony taken by interrogatories upon a former claim, (which had been dismissed,) to the same property, between the same parties and upon the same question, is admissible. *Evans vs. Lampkin et al. Dudley* 193
2. What a witness, who is since dead, testified in a former action, between the same parties, when the same point was in issue, may be proved in a second action by one who heard him give evidence. *Jackson vs. Loude. R. M. Charl.*..... 38
3. But the witness must be competent to speak to the whole, and not to a part only of the testimony of deceased witness. *Ibid.*
4. *Quere.* Whether the second witness must be required to repeat the very words, or the substance only of such testimony? *Ibid.*
5. Interrogatories taken in one case, in order to be used in another, must be between the same parties and relate to the same subject-matter; and then will be introduced, only from the necessity of the case; the witness being dead, or beyond the jurisdiction of the Court. *Cranford, Gov. &c. vs. Word et al. 7 Ga.*..... 445

X. VARIANCE: PLEADING AND PROOF.

1. An instrument under seal, but not described in the pleadings as a sealed instrument, is inadmissible in evidence, on account of the variance. *Smith vs. Baker. Ga. Decisions, part I.*..... 126
2. In debt on judgment, the allegation that a sum certain was recovered as costs, is not supported by a record in which the costs are left in blank. The variance is fatal. *Summers vs. Mantz et al. Ga. Dec. part II.*..... 73
3. An indictment charging the defendant with passing counterfeit coin to A, will not be supported by evidence that A, as agent of the defendant, passed the money to B. *Rouse vs. The State. 4 Ga.*..... 136
4. Where a bill alleged that there was a debt due on a judgment by the co-partnership firm of E. W. & J. D. in favor of C. B. and that a *fi. fa.* had issued thereon, which had been paid off by T. C. & G. J. T. as indorsers; and upon the trial, a *fi. fa.* was offered in evidence, in favor of C. B. vs. E. W. D. as principal, and J. D., T. C. & G. J. T. as indorsers: *Held*, that the evidence was properly rejected, on the ground of

misdescription, there being no offer to amend, so as to make the *allegata and probata* correspond. *Dennis et al. vs. Ray, Receiver.* 9 Ga.... 449

5. A note given for rent of a store-house, is described in the writ as given for rent, omitting "of a store-house:" Held, not to be a fatal variance, under our Statute. *White et al. vs. Molyneux.* 2 Kelly..... 126

XI. RES GESTÆ.

1. Facts that occurred at or about the time of the fatal rencontre, involving the conduct of the deceased, which might have been observed by the slayer, are competent and admissible in evidence, without precedent proof that he had notice of them. *Reynolds vs. The State.* 1 Kelly 230
2. *Res gestæ* are the circumstances, acts and declarations which grow out of the main fact—are cotemporaneous with it, and serve to illustrate its character. *Carter and Wife vs. Buchanan.* 3 Kelly..... 517
3. Declarations of a party, to be admitted as part of the *res gestæ*, must be at the time of the transaction they are intended to explain—must be calculated to unfold its nature and quality, and must harmonize with it. *Ibid.*
4. Declarations of the donor, made on the evening of the same day on which the alleged gift was made, but after it was made, going to show that there was a gift, and the manner of it, are not admissible as parts of the *res gestæ.* *Ibid.*
5. A subscribing witness to a will may prove, as part of the *res gestæ*, the declaration of the testator, at the time of the attestation, that the instrument was his will. *Bonds vs. Gray.* Ga. Dec. part II..... 136
6. Such proof may go to the Jury, as evidence of the revocation of a former will, not found after testator's death, of which a copy had been established. *Ibid.*
- 7 When an act is done, to which it is necessary to ascribe a motive, it is always considered, that what is said at the time, from which the motive may be collected, is a part of the *res gestæ.* *Monroe vs. The State.* 5 Ga..... 85
8. In general, what a party says is not evidence in his favor, unless it be a part of a conversation, some other part of which has been already given in evidence; but where the declarations of the party accompany the act, it becomes a part of the transaction, and is admissible. *Ibid.*

9. The declarations of a defendant, antecedent to the fact, are sometimes admissible, as tending to explain and reconcile his conduct, and to discover the *quo animo* with which the act was committed. *Ibid.*

XII. PRESUMPTIONS.

1. Presumptive evidence will be received, in proof of any fact involved in a criminal prosecution. *The State vs. Calvin et al. R. M. Charl...* 151
2. A will being executed, proof that it remained in testator's possession, and could not be found after his death, is evidence of a revocation. *Bonds vs. Gray. Ga. Dec. part II.*..... 186
3. The presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living. *Lessee of Cofer vs. Flanagan. 1 Kelly*..... 548
4. Evidence of possession of a slave, derived from the donor, in the father of a child to whom it is alleged it was given, is admissible, as explanatory of the possession, though it is, of itself, no proof of a gift. *Carter and Wife vs. Buchanan. 3 Kelly*..... 517
5. Where a Justice's Court execution is lost, and its contents proven, and also a levy on land by the Constable, and a return of the same to the Sheriff, the Court will presume that there was also on it the entry of "no personal property to be found." *Lessee of Vaughn vs. Biggers. 6 Ga.*..... 188
6. The general rule is, that where an officer is required to do an act, the omission to do which would be a culpable neglect of duty on his part, it ought to be intended that he has duly performed it, unless the contrary is made to appear. *Ibid.*
7. Presumption of the loss of a paper may arise from lapse of time, which will be taken into account, in determining the question of diligence in the search. *Ibid.* See, also, *Fretwell vs. Lessee of Morrow. 7 Ga.*..... 264
8. Where the presumption of a grant is raised by parol evidence, the same may be rebutted by the same species of evidence. *English vs. Doe ex dem. Register. 7 Ga.*..... 387
9. The black color of the *African*, is *prima facie* evidence of slavery. *The Macon & Western R. R. Co. vs. Holt. 8 Ga.*..... 157
10. Fraud cannot be presumed at law, but it may be proven by circumstances. *Colquitt vs. Thomas. 8 Ga.*..... 258

11. To make an indorsement of a payment by the holder of a note, admissible evidence to rebut the presumption of the Statute, it must be shown that it was done by the privity of the promissor, or that it was entered when its operation would be against the interest of the party making it. *Smith vs. Simms, Adm'r.* 9 Ga..... 418
12. Whether a father permit property to go home with his daughter immediately upon her marriage, or at any subsequent period, if he suffer it to remain there for a number of years, the presumption of law is, that he intended it as a gift. *Carter and Wife vs. Buchanan.* 9 Ga..... 589
13. A judgment is presumed to be paid, after twenty years. This presumption may be rebutted. *Burt vs. Casey.* 10 Ga..... 178

See *Grants*, 21.

EXCEPTIONS. See *Bill of Exceptions*.

EXCHANGE. See *Bills of Exchange*.

EXECUTIONS.

- I. GENERALLY: AND HEREIN OF THEIR LIEN, &c.
- II. OF LEVIES AND SALES: AND HEREIN OF WHAT IS SUBJECT, AND OF GIVING POSSESSION.
- III. OF SATISFACTION OF EXECUTIONS AND JUDGMENTS.
- IV. OF TRANSFERS OF EXECUTIONS AND JUDGMENTS.
- V. OF AFFIDAVITS OF ILLEGALITY.

AS TO MORTGAGE FI. FAS. see *Mortgage*, III.
 AS TO TAX FI. FAS. see *Tax*.
 AS TO CONTROL BY SURETIES, see *Sureties*.
 AS TO DORMANT FI. FAS. see *Judgment*, VI.

I. GENERALLY: AND HEREIN OF THEIR LIEN, &c.

1. An execution for taxes, takes precedence of *fi. fas.* of older date, in favor of individuals. *State vs. Pemberton et al.* *Dudley*..... 15
2. Where the judgment is for damages only, an execution for debt and damages, is illegal. *The Gov. vs. Daniel. R. M. Charl*..... 449
3. Where the process of the Court is attempted to be used oppressively,

- and against justice, as by levying an execution after the judgment has been satisfied, the Court will grant relief, *upon motion*. *Watts & Joyner vs. Norton*. *R. M. Charl.*..... 353
4. An execution is valid, issued from a confession of judgment, which appears on the writ, and which has been registered, together with the declaration and judgment, upon the permanent records of the Court; although the Clerk omitted to enter such confession upon the minutes. *Davis vs. Barker*. 1 *Kelly*..... 560
5. *Ca. sa.* may issue to enforce a decree in Equity, for a specific sum of money, under the 13th Rule of Equity Practice. *Saunders vs. Smith, Adm'r*. 3 *Kelly*..... 127
6. May be amended so as to conform to the judgment or decree, where there is a variance in the amount, and also as to the time of its return. *Ibid.*
7. Under the Judiciary Act of 1799, an execution cannot issue until four days after the adjournment of the Court. *Harris vs. Wetmore*. 5 *Ga.*..... 64
8. An execution issued after the death of defendant, upon a judgment obtained before death, may be levied on his estate before the expiration of 12 months from the granting of administration. *Ingram vs. Hurt, Adm'r*. 10 *Ga.*..... 563
9. If P. a purchaser at Sheriff's sale, agrees with W. the defendant in *fi. fa.* that the latter may redeem the property, by paying the purchase money back to P. and W. pays a part, and subsequently, within a reasonable time, does pay, or offers to pay the balance, he acquires a title to the property which will subject it to levy and sale as his property. But if after such an agreement, and after the payment back of a part only of the purchase money, P. and W. together with others, or by themselves, enter into a new contract, by which P. agrees to convey the property to a third person, and W. is to pay back to P. the purchase money, and to have satisfaction entered upon a judgment against him, held by this third person, this new contract is valid, and the property is not subject to the lien of a judgment against W. *Dowdle vs. Neal*. 10 *Ga.*..... 148
10. A sale of property under a junior judgment and execution, passes the title, as against the lien of older judgments. *Ibid.*
11. An execution issued upon an order absolute against the Sheriff, is irregular and void—the proper remedy being an attachment. The sureties on his bond are not, however, discharged on that account; their liability being for the official default of their principal, which is

established by the judgment on the rule. *Towns, Gov. &c. vs. Hicks and another.* 7 Ga..... 235

12. An *alias fi. fa.* cannot regularly issue without an order of the Court for that purpose, which order set forth all the previous proceedings which had taken place under the original execution. *Watson vs. Halsted, Taylor & Co.* 9 Ga..... 275

See *Bail*, 14; *Interest*, 4.

II. OF LEVIES AND SALES: AND HEREIN OF WHAT IS SUBJECT, &c. OF GIVING POSSESSION TO PURCHASER.

1. If A be present when an execution is levied on his property, as the property of B, and makes no objection, it is only *prima facie* evidence that he has none; and he may either enter a claim, or publicly forbid the sale. If he does neither, having an opportunity to do so, it will be regarded as a fraud and bar his rights. *Irwin vs. Morell. Dudley*..... 74
2. Money may be taken in execution, if in the possession of the defendant. *Rogers vs. Bullins' Adm'r. R. M. Charl*..... 196
3. Where money is made by the Sheriff at the suit of A, the Court will, on motion, direct the Sheriff to pay it over to an execution against A. *Ibid.*
4. And when such money was made at the suit of A, as administrator of B, the Court will direct it to be paid over to an execution against him as administrator, where it appears to be the oldest lien against the estate, and no interfering or conflicting claims by administrator or other parties, are shown to exist. *Ibid.*
5. The part of a crop to which a cropper is entitled, under a contract, that his portion was to be assigned him after he paid his employer for provisions, with which he should furnish him while he was making the crop, is not the subject of levy until the provisions are paid for. *Hunter vs. Edmondson. Ga. Dec. part I.*..... 74
6. A Sheriff may sell, under execution, the undivided interest of the defendant, in negroes and other personal property, and the purchaser at such sale, becomes tenant in common with the other co-tenants; and until there is a severance or destruction of the tenancy in common, one or more of the co-tenants cannot maintain trover or trespass against the others. *Leonard vs. Scarborough and Wife et al.* 2 Kelly. 76
7. Before Justices' Court executions can levy upon land and negroes, they must have the return of "no other personal property to be found," or else that the defendant being in possession, pointed out the land and negroes. *Hopkins vs. Burch.* 3 Kelly..... 224

8. These entries, if omitted, may be made, *nunc pro tunc*. *Ibid*.
9. When presumed. See "*Evidence*," XII.
10. Under the Act of 1833, requiring Sheriffs and Coroners to put purchasers at Sheriff's sales in possession of lands: *Held*, if possession be not given immediately, or before the next term of the Court, or before the officer making the sale goes out of office, that it can only be done under an order of the Court, with notice to the tenant. *Chambers vs. Collier*. 4 Ga..... 193
11. When the purchaser enters into a subsequent agreement with the defendant in execution, whereby he is suffered to remain in possession, he is considered as having waived his statutory right; and he cannot, upon the failure of the defendant to comply with his contract, two years and eight months afterwards, call on the officer to put him in possession. *Ibid*.
12. Where a decree was obtained in favor of legatees against the executors of the testator's will, for their legacies under it, and the executors have admitted assets in their hands sufficient to pay them: *Held*, that property which had been distributed to another legatee, under the will, with the assent of the executors, could not be first seized and sold, in satisfaction of such decree, against the executors alone, when it did not appear there was any deficiency of assets, to pay all the legacies, and the legatee whose property was taken was no party to the decree; notwithstanding it was declared by the decree, that it should be a lien upon, and bind the whole estate of the testator. The estate of the testator in the hands of the executors is first liable for the satisfaction of the decree, before such portion of it as had been distributed to legatees who were not parties to the decree, and who had been in the possession of it for several years, with the assent of the executors. *Scranton et al. vs. Demere et al.* 6 Ga..... 92
13. The possession of land by the tenant in dower, or as the co-distributtee of an estate, is such an interest as may be seized and sold under execution. *Pitts vs. Hendricks*. 6 Ga..... 452
14. A growing crop of corn, after it is laid by, and before maturity, passes to the purchaser of the land. *Ibid*.
15. A judgment has no lien on promissory notes in the hands of the defendant; nor are *choses in action* liable to be seized and sold under execution, unless made so specially by Statute. *McGehee vs. Cherry*. 6 Ga..... 550
16. Is a railroad subject to levy and sale? *Query*. *The Macon & Western Railroad Co. vs. Parker*. 9 Ga..... 377
17. Where a Constable who did not write a good hand, requested a Jus-

tice of the Peace, *in his presence*, to make a return of "no property" on two *fi. fas.* he knowing the return to be true, of his own personal knowledge: *Held*, that the return was to be considered as the act of the Constable himself, and valid in law. *Ellis vs. Francis.* 9 Ga.... 325

18. Where the purchase money is paid by A, and the titles made to B, the property is subject to levy and sale under executions against A, and the creditor need not go into Equity, but may proceed at Law. *Field et al. vs. Jones and another.* 10 Ga..... 229

III. OF SATISFACTION OF EXECUTIONS.

1. Money paid upon an execution in the hands of the Sheriff or his deputy, discharges the defendant. *Matthis vs. Pollard.* 3 Kelly..... 4
2. A plaintiff having two executions in the hands of the Sheriff, which are liens on money arising from the sale of defendant's property, cannot apply the fund to the *younger*, but the law will appropriate it to the older. *Newton vs. Nunnally.* 4 Ga..... 356
3. An agreement *never* to enforce a judgment, releases the same, but for a *specified time*, does not; and if the judgment is pressed within that time, the defendant's remedy is on the contract, *Chambers vs. McDowell.* 4 Ga..... 185
4. A letter addressed by the plaintiff's attorney to the Sheriff, authorizing him to allow certain payments in calculating the amount due on sundry *fi. fas.* does not give that officer power to enter those sums as credits upon said *fi. fas.* *Harden et al. vs. Central Bank.* 5 Ga.... 449
5. Where an execution has been levied on property claimed by a third person, and the claimant seeks to show that the judgment has been satisfied, he must prove that the payment was made to the plaintiff, or the person holding legal control under him. *Robinson vs. Schly & Cooper.* 6 Ga..... 515
6. The levy of an execution on personal property is a satisfaction of a judgment, so far as to throw upon the plaintiff the burden of proving, either that it was insufficient, or that its proceeds were applied to the extinguishment of prior liens, or that it was otherwise unproductive, and made so without fault in the plaintiff or the levying officer. *Newson vs. McLendon.* 6 Ga..... 392
7. A levy upon personalty sufficient to pay the debt, which is dismissed by the plaintiff, with the consent of the defendant, extinguishes the judgment, so far as third persons may be affected by it. *Ibid.*

8. Payment of a joint debt by one of two defendants, against whom several judgments have been rendered, extinguishes both judgments. *Ibid.*
9. A levy upon real estate is not *prima facie* evidence of satisfaction, and although unaccounted for, does not extinguish the judgment. *Delouch & Wilcoxson vs. Myrick.* 6 Ga..... 410
10. When a defendant is arrested and confined under a *ca. sa.* the fact of giving bond to appear and take the benefit of the Insolvent Debtor's Act, does not, in law, discharge his property from execution under a *fi. fa.* *Higgs vs. Huson.* 8 Ga..... 317
11. The levy and claim of personalty does not, necessarily, preclude the re-levy of the *fi. fa.* pending the claim. *Lynch, Adm'r. vs. Pressley et al.* 8 Ga..... 327
12. Proof that the levy was dismissed, by counsel for plaintiff in *fi. fa.* for want of evidence to condemn the property, at the trial, satisfactorily accounts for the levy, so as to authorize the execution to proceed. *Ibid.*
13. The levy of an execution on personal property, sufficient to pay it, is not, *per se*, an extinguishment of the debt, but a satisfaction, *sub modo*, only. *Ibid.*
14. While the release or dismissal of a levy on personal property—the judgment being unsatisfied—might not operate as a discharge of the execution, between plaintiff and defendant, the effect might be very different, where the rights of third persons were concerned, upon a proper case made. *Ibid.*
15. Where a Sheriff seized and sold the property of a defendant for an amount larger than the sum due on the execution, and returned that the proceeds of the sale were taken for costs, without specifying what costs: *Held*, that such a return was neither legal nor proper, and that it was his duty to state distinctly in his returns, the particular items of costs for which the money arising from the sale of the defendant's property, was appropriated. *Harrison vs. Thompson.* 9 Ga. 310
16. Where an execution is levied upon real and personal property, and the land alone is sold, the *fi. fa.* is not, *prima facie*, satisfied by the levy on personalty, and the purchaser gets a good title. *Dowdell vs. Neal.* 10 Ga..... 148
17. If an execution is paid by the Justice of the Peace, or other collecting officer, to the plaintiff, without stipulating at the time that it is to be kept open for his benefit, it is *functus officio*, and cannot afterwards

be levied for the re-imbursement of the officer. *Arnett vs. Cloud et al.*
 2 Kelly..... 55

18. Where there are separate judgments against several indorsers, and the subsequent indorser pays off the one against himself, and takes an assignment of the one against the first indorser, this does not satisfy the judgment against the first indorser. *Stiles vs. Eastman.* 1 Kelly. 210

See *Judgments*, I. 9, 12, 13.

IV. TRANSFERS OF EXECUTIONS.

1. Under the Acts of 1822 and 1823, to prevent the fraudulent enforcement of dormant judgments and executions, a return must be made by the proper officer, on such execution, every seven years, or it will be presumed to have been satisfied and fraudulently kept open. *Booth vs. Williams.* 2 Kelly..... 253
2. The assignee of a judgment or execution, takes it subject to any defence which might have been set up against the original plaintiff. *Colquitt vs. Bonner.* 2 Kelly..... 155
3. Separate judgments are rendered against the indorsers of the same note. The two last, by agreement with the plaintiffs, take an assignment of the judgment against the first indorser, and pay the plaintiffs the amount due upon the judgments against themselves, which are entered satisfied: *Held*, that the judgment so assigned is not extinguished by the satisfaction of the two other judgments, and that the two indorsers might proceed under this assignment, against the first indorser. *Stiles vs. Eastman et al.* 1 Kelly..... 210
4. The transfer of a *fi. fa.* may be proved by an exemplification of the record of the case, where the assignment is set forth as a part of the record. *Napier vs. Neal.* 3 Kelly..... 300
5. An assignee of an execution does not acquire, by virtue of the transfer, a right to recover damages for a fraud alleged to have been committed against the original plaintiff, four years before the title of the present holder accrued. *Worsham et al. vs. Brown.* 4 Ga..... 285
6. Under the Act of 1829, judgments and executions are negotiable, like promissory notes payable to order; and that Act does not repeal the Common Law Rule which authorized the assignment of the equitable interest in a judgment. *Price vs. Bradford.* 5 Ga..... 364
7. An assignment of a *fi. fa.* should be in writing, in order to vest the legal title in the assignee; and if transferred by delivery merely, the

assignee takes an equitable interest, and may use the name of the plaintiff, for the purpose of enforcing his rights. *Robinson vs. Schly & Cooper.* 6 Ga..... 515

8. Under the Act of 1829, authorizing the transfer of judgments and executions, by written assignment, or control: *Held*, that a formal deed of assignment is not necessary, but that evidence in writing, which shows that the plaintiff has conveyed the interest in the judgment or execution, to the person claiming to be assignee, will be sufficient to enable him to sue out process of garnishment thereon. *Dugas vs. Matthews et al.* 9 Ga..... 510
9. A verbal transfer of a *fi. fa.* for a valuable consideration, is an equitable transfer of the interest, but the actual delivery and consideration must be proved. *Mills vs. Mercer and Wife. Dudley*..... 160

As to control by sureties and indorsers, see "*Sureties*."

V. AFFIDAVITS OF ILLEGALITY.

1. Judgment cannot be entered upon a recognizance, until the sureties have been required by *scire facias*, to show cause why judgment should not be entered against them; and if judgment be so entered, and execution issues, it may be taken advantage of by affidavit of illegality. *Gilmer vs. Blackwell et al. Dudley*..... 6
2. The remedy by affidavit of illegality, does not apply to mortgage *fi. fas.* *Guerard & Polhill vs. Polhill. R. M. Charl*..... 237
3. When an affidavit of illegality is made to an execution, under the provisions of the Judiciary Act of 1799, for causes which existed prior to the rendition of the judgment, such affidavit will be overruled. *The Mayor, &c. vs. The Trustees, &c.* 7 Ga..... 204
4. Upon an affidavit of illegality to the execution, the validity of the judgment cannot be attacked. *Rogers vs. Evans.* 8 Ga..... 143
5. Affidavits of illegality are, upon motion and leave had, amendable in-
stantly, by the insertion of new and independent grounds, provided the defendant will swear that he did not know of such grounds when the affidavit was filed. *Higgs vs. Huson.* 3 Ga..... 317
6. Upon the trial of an illegality, the proof must be confined to the grounds taken in the affidavit. *Ibid.*
7. When a defendant in execution files an affidavit of illegality thereto, he is bound to insert all the grounds which exist at the time. *Hurt vs. Mason.* 2 Kelly..... 369

8. No second affidavit will be allowed for grounds which existed at the time of filing the first. *Ibid.*
9. In a Justice's Court, the Magistrate may decide upon the facts, upon an affidavit of illegality, but if he leaves it to a Jury, there is no error. *Burke vs. McEachem et al. Ga. Dec. part II.*..... 129
10. An affidavit of illegality reaches nothing prior to the judgment. *Sellers vs. Bishop. Ga. Dec. part II.*..... 130
- EXECUTORS. See *Administrators and Executors.*
- EXECUTORS DE SON TORT. See *Administrator, &c. IV.*
- EXECUTORY CONTRACT. See *Contract, II, 4, 8.*
- EXECUTORY DEVISE. See *Devise and Legacy.*
- EXECUTORY TRUSTS. See *Trusts.*
- EX-POST FACTO LAWS. See *Constitutional Law, III.*
- FACTORS. See *Lien, III.*
- FAILURE OF CONSIDERATION. See *Pleading, IV. 21, 22; Promissory Notes, I.*
- FEES. See *Titles of the several Officers.*

FELONY—COMPOUNDING OF.

1. An award, based upon an agreement to abandon a prosecution for a felony, is not the subject-matter of an action. *Levy vs. Ross. T. U. P. Charl.*..... 292

FERRIES.

1. The right to receive toll for the transportation of travellers and others across a river or a public highway, is, at Common Law, a franchise of the Crown. In this State it belongs to the people collectively. *Young vs. Harrisons. 6 Ga.*..... 130

2. The owner of land on the banks of a river has not, as a matter of right, and merely because he is owner, the privilege of keeping a public ferry. His right to do so can only arise by grant, actual or implied. *Ibid.*
3. The franchise or right to keep ferries, should, if practicable and consistent with the public welfare, be conferred on the owners of the soil, rather than on strangers. *Ibid.*
4. Seven years' exclusive and continued possession and enjoyment of a ferry right is, in this State, presumption of a grant. *Williams vs. Turner and another.* 7 Ga..... 296
5. Where E. advances to T. money to purchase a tract of land, in consideration that T. would secure the ferry right in the land to E.: *Held*, that an implied trust is created, as to the ferry right, and that T. holds it as trustee for E. *Ibid.*
6. Grants to land on water courses, from the State, *with the appurtenances*, convey no right of *public ferry*. The right of *private ferry* passes with the fee; and for any interference with this, the owner is entitled to compensation. *Harrisons vs. Young.* 9 Ga..... 359
7. Proof of seven years' regular and uninterrupted use of a public ferry, in this State, is *prima facie* evidence of a prescriptive right. *Ibid.*
8. The ancient doctrine of the Common Law, that the franchise of ferries, although not declared to be exclusive, is necessarily implied in the grant, is inapplicable to both the local situation and political institutions of this country. *Shorter et al. vs. Smith et al.* 9 Ga..... 517
9. This doctrine had its origin in the feudal system, and has undergone great modification, if it has not been entirely abandoned, even in England. *Ibid.*
10. The whole legislative history of this State shows, that the understanding of our people has been, that exclusive privileges are never conferred where none such are expressly given by the charter. *Ibid.*
11. Does a grant to build a bridge confer a ferry right, and *vice versa*? *Ibid.*
12. The Legislature in a charter declare "that it shall not be lawful for any person or persons, at any time or times, to build any bridge, or keep any ferry on the river Great Ogeechee, within five miles, either above or below, (another bridge on the same stream:)" *Held*, that the distance of five miles is to be measured by the course of the river. *McLeod et al. vs. Burroughs.* 9 Ga..... 213

FINES. See *Criminal Law*.

FORECLOSURE. See *Mortgage*.

FOREIGN ATTACHMENT. See *Attachment*.

FOREIGN JUDGMENT. See *Judgment*.

FOREIGN LAWS. See *Evidence*, II. 33.

FORFEITURE. See *Criminal Law*.

FORGERY. See *Criminal Law*.

FORMER RECOVERY. See *Judgment*, II.

FORTHCOMING BOND. See *Bonds*.

FRANCHISES. See *Bridges: Constitutional Law*, I.; *Ferries*; *Grants*, I.; *Rail Road and Plank Road Companies*.

FRAUDS AND FRAUDULENT CONVEYANCES.

I. FRAUD IN GENERAL.

II. FRAUDULENT CONVEYANCES.

III. THE STATUTE OF FRAUDS AND PERJURIES. SEE *CONTRACTS*, II.

I. FRAUD IN GENERAL.

1. If a party, having a claim to property, stands by and sees it levied on and sold, without making claim or giving any notice of his title, having an opportunity of doing so, it will be regarded as a fraud upon the purchaser, or such gross laches as will bar any future claim. *Irwin vs. Morell. Dudley*..... 74
2. If on the trial of a claim, the Jury are satisfied that the claimant purchased the property at Sheriff's sale, with the money of defendant, they should declare his title void as to creditors. *Cumming vs. Fryer. Dudley*..... 183
3. Contracts entered into to defraud the Government are void, as against public policy. *Longstreet vs. Reeside & Fuller. Ga Dec. part I*..... 39

4. In cases of fraud, Courts of Law and Equity have concurrent jurisdiction, except in cases of fraud in obtaining a will. *Trippe et al. vs. Lowe et al.* 2 *Kelly*..... 305
5. *Fraud* vitiates all contracts. *Coffee et al. vs. Newsom.* 2 *Kelly*..... 459
6. If a creditor purchase property of his debtor, in satisfaction of his own debts and the debts of other favored creditors, and buy a large surplus over, to the exclusion of a particular creditor, whose suit is pending, it is a badge of fraud. *Peck vs. Land.* 2 *Kelly*..... 8
7. The possession of property, real or personal, remaining with the vendee after an absolute deed of conveyance, is evidence of fraud. *Ibid.*
8. Fraud in the promisee, without damage to the promisor, is not sufficient to invalidate a contract. *Austell vs. Rice.* 5 *Ga*..... 472
9. Mere inadequacy of price, or any other inequality in the bargain, does not constitute, *per se*, a ground of fraud; but where there are other ingredients in the case, of a suspicious nature, or the peculiar relations of the parties, gross inadequacy of price must necessarily furnish the most violent presumption of fraud. *Robinson vs. Schley & Cooper.* 6 *Ga.* 515. See, also, *Wormack vs. Rogers et al.* 9 *Ga*... 60
10. Where a person having title to property, of which he is apprised, stands by and suffers it to be sold by the Sheriff, without asserting his title, or making it known to bidders, he cannot afterwards set up his claim; and in such case, even infancy would be no protection, provided the minor had arrived at those years of discretion where a fraudulent intent could be reasonably imputed to him. *Whittington vs. Doe ex dem. Wright.* 9 *Ga*..... 23
11. The plea of a *total* failure of consideration to an action upon a contract under seal, on the ground of *fraud*, will be allowed in a Court of Law. *McKnight vs. Killet.* 9 *Ga*..... 532

See *Admr's, &c. IX.*; *Bills of Exchange*, 15; *Deceit*; *Equity, I. c.*; *Grants*.

II. FRAUDULENT CONVEYANCES.

1. The possession of property, real or personal, remaining with the vendee after an absolute deed of conveyance, is evidence of fraud. *Peck vs. Land.* 2 *Kelly*..... 12
2. A creditor or third person may pay a full and fair price to an insolvent debtor for property; still, if the purchase is made to delay or defraud creditors of their rights, it is void as to them. *Ibid.*

3. Possession remaining with the vendor, is *prima facie* evidence of fraud; and the rule is the same with relation to voluntary conveyances, or conveyances for a valuable consideration. *Fleming vs. Townsend.* 6 Ga..... 103
4. *Purchasers* are not within the terms of 13th Eliz., nor is personalty within the terms of 27th Eliz.; but purchasers fall within the spirit of 13th Eliz., and personalty within the spirit of 27th Eliz. *Ibid.*
5. Upon Common Law principles, a voluntary conveyance is void against a subsequent *bona fide* purchaser, without notice. *Ibid.*
6. Possession remaining with the mortgagor after a sale by the Sheriff, under the mortgage, and purchase by the mortgagee, is a *badge of fraud*, as against other judgment creditors. *Williams vs. Kelsey & Halsted.* 6 Ga..... 365
7. The pendency of suits against a debtor at the time that a purchaser buys land of him, is a badge of fraud, and a fact which the Jury are at liberty to consider, in determining whether the purchaser bought with notice or not, under the Statute 13th Elizabeth. *Colquitt vs. Thomas et al.* 8 Ga..... 258
8. To subject land sold before judgment by the defendant to A, and by A to B, it is necessary that plaintiff prove that the defendant sold fraudulently, and that both A and B had notice of the fraud. *Ibid.*
9. One who buys from a fraudulent grantee, without notice of the fraud, and one who buys from an innocent grantee, with notice, will be protected under the proviso in Statute 13th Elizabeth. *Ibid.*
10. If one buys land of a debtor, and pays part of the purchase money before getting a deed, and before paying the balance, learns that the purchase money is unpaid by the debtor; that he is insolvent, and that suits are pending against him, these facts may be submitted to the Jury, as evidence that he purchased with notice of the fraud, under Statute 13th Elizabeth. *Ibid.*
11. Mere rumor is not notice. *Ibid.*
12. The presumption of fraud arising from the continued possession of chattels by the vendor, after an absolute sale, may be explained; otherwise, it becomes conclusive. *Beers et al. vs. Dawson, Ex'r.* 8 Ga.. 556
13. A conveyance of property to prevent the lien of expected judgments from attaching, is illegal, and the party so transferring his property, will not be aided by a Court of Equity in reclaiming it. *Galt vs. Jackson.* 9 Ga..... 151

14. Where a deed of conveyance includes several tracts or lots of land, and is attacked as being fraudulent, the vendor remaining in possession of the whole or any part of the land conveyed, is *prima facie* evidence of fraud (as to the whole conveyance) against creditors. *Perkins, Hopkins & White et al. vs. Patten.* 10 Ga..... 241
16. The title of a *bona fide* purchaser without notice of a prior voluntary conveyance is good. *Fowler vs. Waldrip.* 10 Ga..... 350
15. To defeat the title in favor of the voluntary conveyance, notice at the time of the purchase must be brought home to the purchaser. The registry of the deed is not such notice. The notice must be actual and not constructive. *Ibid.*

See *Assignments, III.; Contracts, I.; Equity, I. c.*

FREE PERSONS OF COLOR. See *Slaves.*

FUGITIVE FROM JUSTICE. See *Constitutional Law, I. 15.*

GAMING.

1. In an action against an administrator, for money had and received by his intestate, (which was won at cards,) it is necessary to prove that the intestate actually *received* the money in question. Proof that he was in partnership with others that gambled, won and received, is insufficient. *Bank of Georgia vs. Clarke.* *Dudley*..... 83
2. An agent, who lost the money at cards, is not a competent witness until released. *Allen vs. Lacy et al.* *Dudley*..... 81

See *Criminal Law.*

GARNISHMENT.

1. The Act authorizing and requiring garnishees to answer out of the County of their residence, was constitutional. *Huron vs. Huron. T. U. P. Charl.*..... 160
2. A corporation cannot be garnisheed under the Statute of 1822, author-

- izing garnishments in certain cases therein mentioned. *Rives vs. Bouleware et al. Dudley*..... 153
3. The acceptor of a bill of exchange, is not liable upon a garnishment, at the instance of a creditor of the drawer. *Dibble vs. Gaston. R. M. Charl* 444
4. A garnishee, summoned during the pendency of a suit against him, by the defendant, for the debt due by him, will be discharged from the judgment in the suit by the defendant, on paying up the judgment on the garnishment. *Westbrooks vs. McDowell et al. Ga. Dec. part I.* 133
5. When a garnishee answers in a Justice's Court, that he is indebted in a sum exceeding \$30, the Court cannot take jurisdiction of the case. *Mahone vs. McDonald et al. Ibid.*..... 154
6. If a debtor owning a chose in action, assigns the same, prior to garnishment served, the rights of the assignee will prevail over those of the garnishing creditor. *Whitten vs. Little. Ga. Decisions, part II...* 99
7. When a garnishee denies, in his answer, all indebtedness, the traverse should specify how he is indebted. *Wiley vs. P. & M. B'k, &c. Ga. Decisions, part II.*..... 187
8. The question whether a garnishee is liable for interest upon the fund in his hands, which is sought to be recovered by process of garnishment, is not one of strict law, but of discretion, depending upon considerations of Equity growing out of the facts and circumstances of the particular case. *Ga. Ins. & Trust Co. vs. Oliver. 1 Kelly*..... 39
9. When the garnishee resists the payment of the fund in his hands into Court, or controverts his indebtedness, he will be held liable for interest. *Ibid.*
10. It is a general rule, however, that persons who are prevented from paying over money, by process of the Court, are not liable for interest. *Ibid.*
11. Where a party has his remedy by garnishment, he cannot go into Equity, unless there is something peculiar in the circumstances of the case. *McGough & Crews vs. The Ins. Co. &c. 2 Kelly*..... 153
12. An appeal lies from a verdict upon an issue formed on a return to a summons of garnishment, as a matter of right. *Strickland vs. Maddox. 4 Ga.*..... 393
13. It is not a collateral issue. *Ibid.*

14. Collateral securities in the hands of a creditor, are not the subject of garnishment at the instance of other creditors. *Hall vs. Page.* 4 Ga. 428
15. A, the debtor of B, upon a negotiable note not due, is summoned by C, the creditor of B, to answer upon process of garnishment; B subsequently transfers the note to D, with express notice of the pendency of the garnishment: *Held*, that judgment against A, in favor of the attaching creditor, may be pleaded in bar of the suit of D, the assignee of the paper. *Glanton vs. Griggs.* 5 Ga..... 420
16. An attorney at law who has money or other effects belonging to the defendant in his hands, is subject to be garnisheed. *Tucker vs. Butts et al.* 6 Ga..... 580
17. A defendant in *fi. fa.* has the right to transfer promissory notes in his possession, to other than judgment creditors, in satisfaction of their claim, and the makers thereof will not be liable to garnishment. *McGehee vs. Cherry.* 6 Ga..... 550
18. Where a warehouse-man gives a receipt for cotton stored by A, in which he promises to deliver the cotton to A or the bearer of the receipt, and is subsequently served with a summons of garnishment, by a creditor of A: *Held*, that he is not relieved from liability, by the delivery of the cotton to the holder of the receipt, to whom it was transferred after the service of the garnishment. *Smith vs. Pickett.* 7 Ga. 104
19. A holds a demand against B, and sues out process of garnishment to C, who is indebted to B by note, and obtains a judgment on the garnishment; D, as assignee of the note due by C to B, transferred after the service of the process of garnishment, institutes suit thereon against C, who pleads the judgment on the garnishment in bar: *Held*, that the plea is not a good defence. *Brannon vs. Noble.* 8 Ga..... 549
20. Upon the trial of an issue formed on the answer of garnishees on the appeal, it is competent for them to take exception to the evidence of the plaintiff, tendered to show that he is the assignee of the judgment upon which the garnishment issued. *Dugas vs. Matthews et al.* 9 Ga..... 510
21. The transfer of a negotiable note, upon which suit is pending: *Held*, to convey such an interest in the judgment obtained thereon, in the name of the transferer, as will enable the transferee to sue out process of garnishment thereon. *Ibid.*
22. A formal deed of assignment of a judgment, is not necessary to authorize the assignee to sue out a process of garnishment. *Ibid.*
23. Plaintiffs in *fi. fa.* cannot go into Equity, to subject debts due to the

defendant, until they have tried the remedy by garnishment, and found that inadequate. *Field et al. vs. Jones.* 10 Ga..... 229

GIFT.

1. To constitute a valid parol gift of a chattel, there must be an immediate delivery of the same, by the donor to the donee. *Anderson and Wife vs. Baker.* 1 *Kelly*..... 601
2. The bare declaration of the donor that "she had given certain negroes to the donee, and had no right to sell them," is not sufficient evidence of a gift, (the donor remaining in possession,) without evidence of *some act* from which the Jury may infer a delivery of the property. *Ibid.*
3. Whether a father permit property to go home with his daughter, immediately upon her marriage, or at any subsequent period, if he suffer it to remain there for a number of years, the presumption of law is, that he intended it as a gift. *Carter and Wife vs. Buchanan.* 9 Ga. 539. See, also, *Pendleton et al. vs. Mills et al.* Ga. Dec. part II..... 166
4. It was agreed between A and B, that if B would undertake the management of A's affairs, and collect in certain funds due to her, that "B should retain out of the first money received, the amount of \$1000 — \$500 of which was to be his then, and the remaining \$500 he was to retain and use as his own, but at her death was to pay over to C, the amount of \$500, without interest:" *Held*, that the agreement created a gift to B, in trust for the use of C, to be paid to C at the death of A, without accountability for interest. *Gordon vs. Green.* 10 Ga. 534
5. Also, that the gift was perfected so soon as the fund was collected by B, and was then irrevocable. *Ibid.*

See *Evidence, XII.*

GOVERNOR.. See *Grants*, 6, 27; *Mandamus*, 17.

GRAND JURY. See *Jury*.

GRANTS.

1. Grants to land, for which the State has *no title*, are examinable collaterally at Law, especially where such grants issued contrary to the prohibition of a Statute. *Com. of Brunswick vs. Dart. R. M. Charl.* 497
2. A Statute appropriating property to the public, is an irrevocable grant of such property. *Mayor, &c. vs. Pres't Steamboat Co. R. M. Charl* 342
3. Grantees of land from the State and their assigns, hold the same, under the tacit agreement or implied understanding that it may be taken for public use, provided a just compensation be made therefor. *Young vs. McKenzie et al. 3 Kelly*..... 39
4. Vacant lands only, are subject to be granted on head-rights, in this State. *Moody vs. Fleming. 4 Ga*..... 115
5. Lands in possession of a grantee, under a grant void for irregularity, and whose possession has continued for more than seven years, is not *vacant. Ibid.*
6. The Act of 1837, authorizing and requiring the Governor, Secretary of State, &c. to correct errors in grants, and to issue alias grants, is unconstitutional, so far as the rights of others than the State and original grantee are concerned. *Hilliard vs. Doe ex dem. Connelly. 7 Ga.* 172
7. If a grant be void upon its face, or be issued without authority, or against a prohibition in a Statute, or if the State has no title, it may be impeached collaterally in a Court of Law. But in general, other objections and defects must be put in issue by a regular course of pleadings, by *bill* or *scire facias. Ibid.*
8. Where the presumption of a grant is raised by parol evidence, the presumption may be rebutted by the same species of evidence. *English vs. Doe ex dem. Register. 7 Ga*..... 387
9. The Superior Courts of this State have the power to relieve a citizen against a grant which has been improvidently issued, upon a proper case made. *Lamb vs. Harris. 8 Ga*..... 546
10. Where a party seeks to be relieved in Equity from the effect of a mistake, he must show due diligence on his part. *Ibid.*
11. A party who has obtained a grant to land, under the Act of the Gen-

eral Assembly, passed in 1845, cannot be affected by the fraudulent conduct of the State House officers, unless he participated therein. *Ibid.*

12. A grantee in this country takes nothing by implication, but is confined to the terms of his charter. *Harrisons vs. Young.* 9 Ga. 359. See also, *Shorter vs. Smith.* *Ibid.*..... 517
13. Grants to land on watercourses, from the State, *with the appurtenances*, convey no right of *public* ferry. The right of private ferry passes with the fee ; and for any interference with this, the owner is entitled to compensation. *Ibid.*
14. A warrant and survey of land and payment of the price, gives to the purchaser a *legal right* of entry, sufficient to maintain ejectment. *Winter vs. Jones.* 10 Ga..... 190
15. A patent or grant is only necessary to ascertain that all the pre-requisites of the law have been complied with. *Ibid.*
16. The only difference between a legal and an equitable title, consists in the payment or non-payment of the purchase money. *Ibid.*
17. In case of sales of land by the State, under an Act of the Legislature, the *law* gives the right, and the grant is to be considered not as *title*, but the *evidence* by which it is shown that the pre-requisites have been complied with. *Ibid.*
18. A purchaser of land from the State, by the act of *entry* and *payment*, acquires an inchoate legal title which may descend, be aliened or divested in the same manner as any other legal title. *Ibid.*
19. A purchaser who has paid for his land, and holds a certificate or receipt from the agents of the State to that effect, acquires a title sufficient to enable him not only to protect his possession, but to oust any intruder, by due course of law, *Ibid.*
20. The holder of a certificate, who has paid for the land, is indefeasibly entitled to a grant, which the certificate and the law imperatively command to be issued. *Ibid.*
21. Every presumption is in favor of a grant. *Ibid.*
22. In general, a Court of Equity is the tribunal best adapted to try the validity of a grant. *Ibid.*
23. Where the State has no title to the thing granted, or where the Governor had no authority to issue the grant; in such cases, the defect

appearing upon its face, the grant is absolutely void, and may be impeached collaterally in a Court of Law, in an action of ejectment. *Ibid.*

24. A grant purporting on its face to be issued by virtue of an unconstitutional law, is void and can carry no title. *Ibid.*
25. Where the fraud complained of does not appear upon the face of the grant, but arises in circumstances *dehors* the grant, the grant is voidable only by suit, and cannot be impeached collaterally by parol proof. *Ibid.*
26. Other objections than those apparent upon its face, must be put in issue in a regular course of pleadings, on a direct proceeding to avoid the grant. *Ibid.*
27. An order of the Governor, correcting a supposed mistake in a grant, by changing the surname of the grantee, after the rights of third persons, other than the original grantee had attached, is inoperative and void. *Sykes vs. The Lessee of McRory, Adm'r.* 10 Ga..... 445
28. A grant issued by mistake can only be avoided by *sci. fa.* or other proceeding for that purpose, in Chancery. It cannot be impeached collaterally in an action at Law, by showing that the grantee intended, was a different person and of a different name from the one mentioned in the grant. *Ibid.*

See *Constitutional Law, IV. Ferries, 2 to 12.*

GROWING CROP. See *Execution, II. 13.*

GUARANTY.

1. A promise by a third person, to the drawer of a bill of exchange, that the drawee shall accept it, will enure to the benefit of an accommodation indorser, if communicated to him by the promissor's authority. And such indorser may sustain an action thereon for breach of guaranty. *Hitt & Dill vs. Lippitt. Ga. Dec. part II.*..... 89
2. Where an offer of guaranty is made, accompanied with a request for an answer, in order to make it binding upon the individual offering, it is necessary that he be informed by the person to whom it is offered, of his assent to such offer. *Valloton vs. Gardner. R. M. Char.*..... 86

3. Where no such assent is signified, and the note of the individual, for whose benefit the guaranty was offered, is taken by the creditor, it is a complete waiver of the guaranty. *Ibid.*
4. Upon the transfer of a note payable to bearer by delivery, the transferor ceases to be a party to it, and is not generally responsible thereon to the transferee, or any subsequent holder. But if he undertake to guaranty the payment of the same, he will be liable on that special contract, and that is a proper subject-matter of set-off. *Crenshaw vs. Jackson.* 6 Ga..... 509
5. A transfers a note, payable to bearer, to B by delivery, and says, "C, (the maker) although a poor man, is perfectly good for his contracts, and if C is not good, I am good:" Held, that these sayings are admissible to support a plea of a promise and undertaking to guaranty the payment of the note. *Ibid.*

See "Contracts, II.

GUARDIAN AND WARD.

I. GENERALLY.

II. GUARDIAN'S BOND: SURETIES: SUITS THEREON, &c.

I. GENERALLY.

1. The estate of a guardian, who dies chargeable to his ward, is bound and liable therefor before any other debt, even though in judgment. *Watson et al. vs. Ex'r. of Watson.* 1 Kelly, 268. See also, 10 Ga. 65
2. In a bill filed by a ward against his former guardian, the latter will be allowed to prove the payment of debts contracted *before*, but paid *after* his dismission, and that too, without having the vouchers allowed by the Court of Ordinary. *Stell vs. Glass.* 1 Kelly..... 485
3. An order of the Court of Ordinary authorizing a guardian to invest funds of the ward in the purchase of land for the purpose of cultivation, cannot be impeached in any other Court except for fraud. *Ibid.*
4. If a guardian dies, or is removed, and no successor is appointed by

- the Ordinary, a Court of Chancery may appoint a guardian, *ad litem*, for a suit already pending. *Leonard vs. Scarborough et al.* 2 Kelly.. 76
5. The returns of a guardian are only *prima facie* evidence in his favor, and may be impeached, the burden of proof being on the party impeaching them. *Brown vs. Wright.* 5 Ga..... 29
6. Where a guardian pleads the final receipt of his ward in bar of an account: *Held*, that his admission in his answer, that he had not made regular returns to the Ordinary, was such a circumstance as cast suspicion on the settlement, and would avoid the plea. *Briers vs. Hackney et al.* 6 Ga..... 419
7. Ordinarily, guardians who have given security for the faithful performance of their duty, have the legal control over mortgage debts owing their wards, and a right to receive and collect the moneys due thereon, and to release the same, in the proper exercise of their discretion as guardian. *Perkins and others vs. Dyer.* 6 Ga..... 401
8. But where a mortgage is executed to a mother, as the natural guardian of her children, by the administrator of their deceased father, to secure them in their patrimony, which he has wasted, it is not in the power of the mother fraudulently to discharge the mortgage lien, to the prejudice of the infant *cestui que trust*, especially where she has failed to give bond as required by law, to protect them against mismanagement. *Ibid.*
9. At Common Law, the mother, as guardian by nature or for nurture, has no control over the estate of her minor children. *Ibid.*
10. A guardian failing to make returns, forfeits all his commissions. *Ibid.*
11. Where the record of a judgment of the Court of Ordinary of Troup County, was offered in evidence to prove the appointment of a guardian of a ward residing in the State of Alabama: *Held*, that it should *affirmatively* appear on the face of the record and proceedings, that either the *person* of the ward was within the County, or that she had *property* within the limits of the County, so as to give the Court jurisdiction, and that the *want of jurisdiction*, either of the *person* or *property* of the ward, appearing on the face of the record offered in evidence, it was properly rejected. *Grier vs. McLendon.* 7 Ga..... 362
12. When returns are made to the Clerk of the Court of Ordinary, under the Act of 1820, it is the duty of the Court to pass them to record, or reject them at the next term of the Court after they are rendered to the Clerk, and if judgment is had after that time, passing them to re-

cord, such judgment is irregular and may be set aside. But such judgment cannot be attacked collaterally, and while unrevoked, will admit the returns in evidence, in a suit by the ward against the guardian. *Ragland vs. The Justices, &c.* 10 Ga..... 65

13. A minor who has an estate, but whose parents are in life, is an orphan, in the meaning of the Act of 1799. *Ibid.*

See *Administrators and Executors, passim.*

II. GUARDIAN'S BOND: SURETIES: SUITS THEREON, &c.

1. In a suit upon a guardian's bond, the party is not entitled to the custody of the original, but to a certified copy only. *Bryant et al. vs. Owens and Wife.* 1 Kelly..... 368
2. The discharged surety of a guardian is only released from the future, and not from past liabilities of his principal. The substituted surety is liable for both past and future. *The Justices, &c. vs. Woods & Vason.* 1 Kelly..... 87
3. The Ordinary has no power to discharge a surety from a liability already incurred. *Ibid.* See, also, *Bryant vs. Owens & Wife.* 1 Kelly. 371
4. The surety may be discharged under the Act of 1805; but in the exercise of this power, the law presumes that the Ordinary will so act as not to injure but to protect the rights of the ward. *Bryant et al. vs. Owens and Wife.* 1 Kelly..... 368
5. In a suit against a discharged surety on a guardian's bond, the plaintiff must prove affirmatively some default or act of malfeasance, on the part of the guardian, prior to the discharge of the surety, which, in Law, would amount to a breach of the bond. Evidence of the bare reception of the ward's estate and nothing more, is insufficient. *Ibid.*
6. Where the decree against the guardian is silent, as to the time of the *devastavit*, the decree alone will be insufficient to charge a surety discharged before the commencement of the suit in Equity; *aliter*, if the surety has not been discharged. *Ibid.*
7. In an action by the present guardian against the administrator of the former guardian and his sureties on the bond, the plaintiff must show affirmatively some act of waste or mal-administration by his predecessor during his life; and the bare reception of money for his wards, without farther proof of default, is not, *per se.* a breach of the bond. *Ray, Adm'r, and others vs. The Justices, &c. Macon County.* 6 Ga..... 503

8. In an action by the present guardian against the administrator of a deceased guardian and his securities, upon their bond, in which the breach alleged is the receipt of three several sums of money by the former guardian, which he had appropriated to his own use, the measure of damages is the aggregate of principal and accruing interest. *Ibid.*
9. Where the provisions of the Act of 1812, authorizing an executor, administrator or guardian, whose residence shall be changed from one County to another, to make his returns in the County in which he lives, are fully complied with, the sureties on the first bond are discharged from all farther liability on account of their principal. *The Justices, &c. vs. Selman and others.* 6 Ga..... 432
10. Where the Ordinary has granted letters of guardianship, no new appointment can be made, unless the former is vacated by death, removal, or some other way. Such appointment being void, the bond also will be void. *Ibid.*
11. Sureties to executors', administrators' and guardians' bonds, are not liable to suit thereon at Law, under the Act of 13th December, 1820, until the plaintiff has first established his demand against their principal, in his representative character, by suit and judgment, or decree of a Court of competent jurisdiction. *The Justices, &c. vs. Sloan.* 7 Ga..... 31
12. In a bill by a ward against a guardian, for settlement, alleging that he has wasted the estate, and his sureties discharged by the Court of Ordinary; that the waste occurred before the discharge, and that the complainants have no means of proving that fact but by resort to the conscience of the defendant, and a discovery and decree is asked, ascertaining and fixing the time of the waste, with a view to charge the sureties in a future action; the discovery and decree allowed, but no opinion given whether that decree will be evidence in a future suit to charge the sureties. *Woods vs. Woods.* 7 Ga..... 587
13. A dormant judgment in favor of a ward against his guardian, and the execution issued thereon, with a return of "nulla bona" made prior to its becoming dormant, are admissible to prove a *devastavit*, in an action by the ward against the sureties of the guardian. *Carter and Wife vs. Coley.* 8 Ga..... 351
14. In a suit on a guardian's bond, by the ward against the guardian alone, it is not good cause for non-suit, that the plaintiff has not averred and proved a judgment or decree against the guardian, in his representative character, because the suit is against him as such. *Ragland vs. The Justices, &c.* 10 Ga..... 65

See *Administrators and Executors, V. VII. IX.*

GUARDIAN AD LITEM. See *Guardian, I. 4.*

HABEAS CORPUS.

1. Where a prisoner was indicted for robbery, and at the next term a *nol. pros.* was entered on the indictment, (the prisoner demanding a trial thereon,) on a writ of *habeas corpus*: *Held*, that under the Act of 31st Car. II. any person committed for felony, upon his or her petition in open Court, for a trial, who shall not be indicted and tried the second term after commitment, shall be discharged. *State vs. Monaquo & Segar. T. U. P. Charl.*..... 24
2. The Superior Court will not, on *habeas corpus*, discharge a prisoner committed for a contempt of another Court of record, more especially if it be an officer of that Court. *State vs. White. T. U. P. Charl.*.... 136
3. A person committed *regularly* by a Court organized by, and enforcing a law of the U. S. cannot be discharged by a Court of this State. *State vs. Prime and another. T. U. P. Charl.*..... 142
4. It is not competent for the prisoner, on the return of a writ of *habeas corpus*, to go into a *full defence* of his case, for the purpose of establishing his innocence or controverting the facts stated in the depositions of the State's witnesses. *State vs. Asselin. T. U. P. Charl.*.... 187
5. The captors of a prize are entitled to retain in custody a portion of the crew, for the purpose of giving testimony, and the Court will not discharge them on *habeas corpus*. *State vs. Wederstrandt. T. U. P. Charl.* 213
6. A seaman committed under the Act of Congress for deserting his vessel, can be detained only until the vessel is ready to depart; *after* her departure, he will be discharged on *habeas corpus*. *The State vs. Paterson. T. U. P. Charl.*..... 311
7. On a writ of *habeas corpus*, the Court will discharge, admit to bail or remand, according to the circumstances of the case; but it will not try any rights to property. And if the writ be to bring up infants, the Court, though bound *ex debito justitiæ*, to free them from all illegal restraint, it is not bound to deliver them over to any body or to give them any privilege. *State vs. Frazer. Dudley*..... 43
8. In cases of *hab. cor. ad subjiciendum*, the person imprisoned may petition for the writ, or any other person for him. *State vs. Philpot. Dudley* 46
9. The omission of his name is not an irregularity, if enough appear to indicate the person intended. *Ibid.*

10. The petition ought to be supported by affidavit; but in cases of great emergency the writ will be allowed to issue without it. *Ibid.*
11. The benefits of this writ belong to all free persons, of every country and complexion, but not to a slave. *Ibid.*
12. An evasive and insufficient return to the writ, is a contempt of Court, and if obstinately persisted in, will be punished by imprisonment, until the offender yields obedience, or shows that it is impossible to do so. *Ibid.*
13. Irregularity in the writ must be taken advantage of in due time, or the party will lose his opportunity of doing so entirely. *Ibid.*
14. On a *habeas corpus*, at *Common Law*, the Court has the power to change the custody of an infant child, if its interests require it. *In the matter of Mitchell. R. M. Charl.*..... 489
15. More especially if the infant is too young to make a proper election. *Ibid.*
16. The writ applies as well to cases of illegal *detention* as illegal confinement or restraint. *Ibid.* See, also, *ex parte Rulston. R. M. Charl.*..... 119
17. In a contest between its parents, for the custody of a child, the Court will award its possession to that parent who will be most likely to train it properly. *State vs. King. Ga. Dec. part I.*..... 93
18. The Chancellor will not allow it to be taken out of his jurisdiction. *Ibid.*
19. If the *mittimus* specifies no time and place of the offence, the prisoner will be discharged on *habeas corpus*. *The State vs. Bandy. Ga. Dec. part II.*..... 40
20. The Inferior Courts in this State have jurisdiction, under the Act of 1847, to discharge defendants imprisoned on mesne or final process for debt, (when the jail fees are not paid weekly,) on a writ of *habeas corpus*; and the judgment of such Court, whether *erroneous* or not, ordering the Sheriff to discharge a defendant imprisoned on final process for debt, will be a protection to such officer. *Chamblee vs. Holcombe. 7 Ga.*..... 419
21. Upon a return to a writ of *habeas corpus*, it appeared that the petitioner had been brought before the Inferior Court, as a *free person of color*, upon a charge of having violated the Registry Laws; and upon a plea of guilty, was sentenced to pay a fine of \$100, and in default

of payment, to be hired out until paid; and that respondent had hired him in pursuance of the judgment of the Court: *Held*, that he was detained according to law, in pursuance of a judgment of a Court of competent jurisdiction, and that this Court could not enter into the question, whether he was or was not, a free white person. *Yancy vs. Harris.* 9 Ga..... 535

See *Infancy*, 4, 5.

HANDWRITING. See *Evidence*, I.

HEIRS.

1. An heir is not entitled to take possession of any part of the estate of the ancestor, until it is delivered to him by the legal representative or by the law. *Albritton vs. Bird. R. M. Charl.*..... 93
2. The heirs at law may maintain an action of ejectment, to recover the possession of land against a mere wrong-doer. *Lessee of Caruthers vs. Bailey.* 3 Kelly..... 108
3. The heirs at law, or next of kin, are entitled to call for the proof of a will in *solemn form* at any time, and mere acquiescence for a length of time, does not debar them. But if, as legatees, they receive their legacies, then the delay amounts to a waiver, unless accounted for, as by infancy, &c. *Vance et al. vs. Crawford et al.* 4 Ga..... 445
4. No inheritance can vest, nor any person be the actual complete heir of another, until the ancestor is dead. *Beall, Admr'x, vs. Beall & Beall.* 8 Ga..... 210
5. A sale of lands under judgment against an executor *de bonis testatoris*, conveys a good title to the purchaser, and the title of the heirs is divested. *Lessee of Worthy vs. Hames.* 8 Ga..... 234

See *Constitutional Law*, I. 39.

HIGHWAYS. See *Roads*.

HONEST DEBTOR'S ACT. See *Insolvent Debtors*.

HUSBAND AND WIFE.

I. RIGHTS AND LIABILITIES OF HUSBAND.

II. RIGHTS AND DISABILITIES OF WIFE, AND HEREIN OF THE WIFE'S EQUITY.

III. SEPARATE ESTATES: MARRIAGE ARTICLES: SETTLEMENTS: AND ARTICLES OF SEPARATION.

IV. DIVORCE AND ALIMONY.

I. RIGHTS AND LIABILITIES OF HUSBAND.

1. When a man marries a woman holding property in her own right, he is entitled to that property, if he reduce it to possession in the lifetime of the woman. But if he does not, and dies, the property survives to the wife, and does not vest in his executor or administrator. *Early vs. Sherwood. Dudley*..... 7
2. And if property be given to the wife *during coverture*, it vests absolutely in the husband, and need not be by him reduced to possession in the lifetime of the husband. *Ibid.*
3. At Common Law, marriage amounts to an absolute gift to the husband of all the personal estate of the wife, of which she is at the time actually possessed in her own right. *Bell et al. vs. Bell. 1 Kelly*.... 639
4. In the wife's *choses in action*, the husband obtains only a qualified property, which may be made absolute by a reduction into possession during life. *Ibid.*
5. Creditors of the husband who claim to be subrogated to his rights, as against the property of the wife, have no other rights than the husband who is *their debtor*, against such property. *Sayre vs. Flournoy et al. 3 Kelly*..... 551
6. The husband, as administrator of his deceased wife, is entitled to recover an interest in remainder, *vested* during the life of the wife. *McGinnis, Adm'r, vs. Foster, Ex'r. 4 Ga.*..... 377
7. A husband surviving his wife, is entitled to all her *choses in action*, whether reduced to possession in his lifetime or not. *Lee, Adm'r. vs. Wheeler. 4 Ga.*..... 541
8. Cohabitation and joint use of goods purchased by the wife during *coverture*, is strong presumptive evidence of the assent of the husband,

and of the agency of the wife in the purchase; which, however, may be repelled by proof that the credit was, in fact, given to the wife. *Connerat vs. Goldsmith*. 6 Ga..... 14

9. A sells goods to the wife of B, and takes her note for the amount—she having a separate estate—and gives her a receipt for the bill. The husband and wife are living together, and the goods go into their joint use and occupation: *Held*, that the credit was given to the wife, and the husband is not liable, in a suit by the creditor, for the price of the goods. *Ibid*.
10. In such a case, a parol promise by the husband to pay the debt, is void, under the Statute of Frauds, because it is a promise to answer for the debt of another, and ought to be in writing. *Ibid*.
11. A husband may, by *deed or will*, in his lifetime, deprive his wife of the whole of his estate, except *dower*. So also, he can procure an Act of the Legislature to be passed, limiting her right of inheritance after his death. *Beall, Admr'x, vs. Beall*. 8 Ga..... 210
12. By the Act of 1828, a *feme covert* is disqualified from acting as the representative of an estate during coverture. In such case the husband is entitled to be substituted in her stead. *Leverett vs. Dismukes*. 10 Ga..... 98

II. RIGHTS AND DISABILITIES OF WIFE: AND HEREIN OF THE WIFE'S EQUITY.

1. The wife is entitled in Equity to a suitable provision for herself and her children out of her fortune, whenever it is within reach of a Court of Chancery, and not reduced into possession by the husband; and this right extends to both legal and equitable claims in action. *Bell et al. vs. Bell*. 1 *Kelly*..... 639
2. Whether the children have a distinct substantive claim to a provision? *Query. Ibid*.
3. The wife may file her bill by her next friend, to assert her equity. *Ibid*.
4. The wife's equity is good against her husband's assignees in bankruptcy or insolvency, against his assignees to pay his debts generally, and also against a special assignee or purchaser for value. *Ibid*.
5. When the wife's father leaves an estate in negroes, a division of the negroes, under our Statute, at the instance of the administrator, setting apart one share to the husband in right of his wife, and leaving it in

the possession of the administrator, neither the husband or wife being present nor represented, and no refunding bond being given, is not such a reduction into possession as will defeat the wife's equity. *Ibid.*

6. The husband has no interest vested in him in his wife's choses in action, until he reduces them into possession; and *as a general rule*, a Court of Equity will not compel the husband to reduce them into possession, so as to defeat the wife's right of survivorship thereto. *Sayre vs. Flournoy, Adm'r, &c.* 3 *Kelly*..... 546
7. Where a judgment creditor comes into a Court of Equity and asks its assistance to have appropriated to the payment of his debt against the husband, property to which the husband may be entitled, in right of his wife, adequate provision must first be made for the support and maintenance of the wife and children, if any. *Napier et al. vs. Howard.* 3 *Kelly*..... 204
8. What will be considered *adequate* provision for that purpose, must depend upon the circumstances of the case; and the condition of the parties. The Court ought to be liberal, and may appropriate the whole or part of the property for the benefit of the wife and children, as it may deem liberal and just. *Ibid.*
9. A *chose in action* belonging to the wife before marriage, and not reduced to possession by the husband during the coverture, survives to the wife. *Stephens et al. vs. Beall.* 4 *Ga.*..... 319
10. A *feme covert* cannot interpose a claim individually, under the Claim Laws of Georgia. *Hardwick vs. Hook, Receiver.* 8 *Ga.*..... 354
11. The Statute of Limitation, does not run against a *feme covert* whose cause of action arose during coverture, even though suit be brought in the name of the husband and herself. *Flynt and Wife vs. Hatchett.* 9 *Ga.*..... 328
12. A *feme sole* having drawn land in the lottery and married before the grant issues, the land does not belong to the husband by the marital right, and if it does not issue until after the death of the husband, the land belongs to the widow, and not to the representatives of the husband. *Salter vs. The Lessee of Williams.* 10 *Ga.*..... 186

See Title "*Dower.*" Also, Article III. 13 and 17, of this title.

III. SEPARATE ESTATE—MARRIAGE ARTICLES—SETTLEMENTS,
AND ARTICLES OF SEPARATION.

1. Marriage is a valuable consideration—as much so as money paid; and a marriage settlement upon a wife and her issue, will not be set aside in favor of even pre-existing creditors. *The Bank vs. Marchand. T. U. P. Charl.*..... 250
2. Not even if the husband was guilty of a fraud, the wife not being *particeps criminis* therein. *Ibid.*
3. A settlement made by the husband on the wife, after marriage, without a valuable consideration, and not executed in pursuance of any agreement entered into before marriage, is a mere *voluntary* conveyance, and *void* as against prior creditors of the husband. *Denbell vs. Fisher. R. M. Charl.*..... 36
4. Marriage articles will be executed in favor of all persons coming within the scope of the marriage consideration, and at their instance, but not at the instance of mere volunteers. *Merritt et al. vs. Scott and Beal, Adm'rs, &c. 6 Ga.*..... 563
5. Those having natural claims upon the parties, such as the wife and offspring, and those claiming under and through them, alone come within the scope of the marriage consideration. *Ibid.*
6. The fact that collaterals are first mentioned in the limitations of the articles, does not bring them within the reach and influence of the agreement. *Ibid.*
7. Where a Court of Equity executes articles in favor of persons within the scope of the marriage consideration, it will, at the same time, execute them also as to volunteers, it being the rule of Chancery to do nothing by halves. *Ibid.*
8. Where, upon application to a Court of Equity, the marriage articles are executed partially, viz: in behalf of one of the settlers, without being executed as to the volunteers: *Held*, that upon a subsequent application to a Court of Equity, at the instance of the volunteers, the former decree cannot be invoked in their favor. *Ibid.*
9. By deed a *femme sole* conveys her estate, in contemplation of marriage, to trustees, to hold for her sole use, until the marriage; to the joint use of herself and her husband, during their joint lives; if she survives him, then to her and her heirs; and if he survived her, then to him and the children of the marriage, if any, jointly, during his

life; if no children or issue, then to him for life; and there being issue or children of the marriage, to them and their heirs forever; and there being no children or issue, from and after the death of the husband to her right heirs. The marriage was solemnized, and the wife died before the husband, leaving children who died before the husband: *Held*, that a life estate was conveyed to the husband and children, with remainder in fee to the children; that the limitations created a vested remainder in the children, at her death; and that at the death of the husband, the property went to the heirs of the children, and not to the right heirs of the settler. *Holcombe vs. Tufts and another.* 7 Ga..... 538

10. Where, by marriage contract, a slave is conveyed to a trustee for the use of the wife for life, and to the offspring of the nuptials in remainder; and subsequently to the death of the wife, and during the infancy of the child who was born of the marriage, the slave was sold by the father to a *bona fide* purchaser, without notice: *Held*, that the issue of the marriage, upon coming of age, can recover the property from the remote grantee of the first purchaser, the vendor having no authority to sell, being neither trustee to the wife nor guardian to the child. *Papot vs. Gibson.* 7 Ga..... 533

11. Where L. and T. executed a marriage settlement in contemplation of marriage, by which the intended wife declared that it was her desire that all her property should be kept and assured to her separate use and enjoyment *forever*, and that her trustee should keep, preserve and assure the same *forever*, unto L. the intended wife, to her entire and free use, control and benefit, free and exempt from all debts of T. the intended husband, then existing, or which might afterwards exist; and T. the intended husband, assented and agreed thereto, in consideration of the intended marriage, and the further consideration of one hundred dollars, received from his intended wife, as a marriage portion: *Held*, on a bill filed by the administrator of the husband against the administrator of the wife, to compel the latter to make distribution to the representatives of the husband, that the husband, by the words and clear intention of the marriage settlement, not only relinquished and abandoned his marital rights to his intended wife's separate property during the coverture, but *forever*, without limitation of time; and that the administrator of the wife was entitled to retain the property, and after the payment of the wife's debts, to distribute to her children. *Holmes, Adm'r, vs. Liptrot, Adm'r.* 8 Ga..... 279

12. A valid agreement may be made between husband and wife, through the intervention of a trustee, for an immediate separation, and for a separate allowance to the wife for her support. *Chapman vs. Gray, Ex'r.* 8 Ga..... 337

13. The agreement for a separation cannot be supported, unless the sep-

aration takes place immediately upon the execution of such agreement, or where the separation had already taken place. *Ibid.*

14. An agreement for a separation will be rescinded, if the parties afterwards cohabit or live together as husband and wife, by mutual consent. *Ibid.*
15. Where valid articles of separation give to the wife power to dispose of property at her death, a will by her, while a *feme covert*, will be supported. *Ibid.*
16. Where a particular mode is pointed out in the marriage settlement, for the disposition of the separate estate of a married woman, she cannot dispose of it in any other way, as where she had power to dispose of it by will, with the *consent and approbation* of her trustee. Such consent is necessary to the validity of a will made by her. *Weeks and Wife vs. Sego and another.* 9 Ga..... 199
17. A married woman is a *femme sole* as to her separate estate, unless controlled by the settlement; and if so restricted, she is a *femme sole sub modo* only, and the mode of disposition prescribed in the instrument must be followed. *Wyly et al. vs. Collins & Co.* 9 Ga..... 223
18. The doctrine of the Bible, and of the Common Law, that husband and wife are one, is superseded by the introduction of a new principle from the Civil Law—that they are distinct persons, with distinct property, and distinct powers over it. *Ibid.*
19. A wife and children who have separate property settled upon them, are not bound to support the husband and father, though owing to his insolvency, they may be bound to support themselves. *Ibid.*
20. Although the husband, as such, has no right to control the separate estate of his wife, yet, he may, like any other person, do a ministerial act, such as purchasing goods for the trust estate. *Ibid.*

See *Trusts and Trustees.*

IV. DIVORCE AND ALIMONY.

1. The Court refused to order an allowance for temporary alimony to a married woman, during the pendency of a libel for divorce and a bill of *ne exeat*, when it appeared by his answer that the husband was willing to take her to his bed and board, and treat her well. *Slack vs. Slack.* *Dudley.*..... 166
3. The only causes for *total divorce*, in Georgia, are those recognised by

- the Common Law, viz: pre-contract, consanguinity, affinity and impotency. *Head vs. Head.* 2 *Kelly*..... 191
4. And the only causes recognized in Georgia, for a partial divorce, are those of the Common Law, viz: adultery and cruel treatment. *Ibid.*
5. On application for a writ of *ne exeat*, by a wife against her husband, pending a suit for a *partial* divorce and alimony, her affidavit is sufficient, she being, in this respect, considered independent of her husband. *McGee vs. McGee.* 8 *Ga.*..... 295
6. A writ of *ne exeat* may be granted in this State, prior to any decree for alimony. *Ibid.*
7. The power to grant temporary alimony, is incidental to the jurisdiction of the Superior Courts of this State, over divorces. *McGee vs. McGee.* 10 *Ga.*..... 477
8. Such a power does not belong, in this State, to a Court of Chancery. *Ibid.*
9. The Superior Court may, upon being judicially informed of the fact of the marriage, in a suit for divorce, on motion, make provision for the wife's maintenance during the pendency of the suit, and for the expenses which she may incur in conducting it, and that whether she is plaintiff or defendant. *Ibid.*
10. The amount of the wife's alimony, is a matter of judicial discretion, depending upon the wealth of the husband, his personal income, the number of children, &c. &c. *Ibid.*
11. Alimony *pendente lite*, is less than permanent alimony, and is limited to a support. *Ibid.*
12. It is competent for the Court to modify the order for temporary alimony, and reduce or increase it as may become proper. *Ibid.*

HUTCHINSON'S ISLAND. See *Savannah*.

HYDROPATHY. See *Physicians*.

INFANCY.

1. A subsequent promise, to avoid the plea of infancy, must be express and deliberately made—a mere acknowledgment is not sufficient. *Martin & Co. vs. Byrour. Dudley*..... 200
2. There can be no adverse possession, to operate against the right of a minor. *Irwin vs. Morell. Dudley*..... 74
3. But where a person having title to property, stands by and suffers another to mortgage or sell it, without asserting his title, or making it known to the mortgagee or purchaser, he cannot afterwards set up his claim. And in such a case, even infancy will be no protection, provided the minor had arrived at such years of discretion that a fraudulent intent could be reasonably ascribed to him. *Ibid.* See, also, *Whittington vs. Lessee of Wright. 9 Ga*..... 23
4. Where it appears that the grandmother of an infant of tender years, is unable properly to maintain and educate her, the Court, on the application of the guardian of such infant, will direct her to be delivered to him, she being too young to make a proper election. *Ex parte Ralston. R. M. Charl*..... 119
5. The father has the right to the custody of his children, but the Courts of Justice may control this right, when the safety or interests of the child imperiously demand it. *In the matter of Mitchell. R. M. Charl*..... 489
6. An infant may disaffirm a deed made during his minority, after he arrives of age, by executing another conveyance. *Wimberly vs. Jones. Ga. Dec. part I*..... 91
7. He may affirm the contract, by doing any act which tends to confirm it. *Ibid.*
8. An infant, by *prochein ami*, may sue upon a note made payable to himself. *Austell, Adm'r, vs. Rice et al. 5 Ga*..... 472
9. If a deed of bargain and sale be executed by an infant, it may be avoided by another deed of bargain and sale, made to a third person, without entry by the infant, when he arrives at age, in case the land continue in possession of the infant, or be vacant or uncultivated. *Harris vs. Camron and another. 6 Ga*..... 382
10. If, when the second deed be executed, the lands be holden adversely to

the infant, it seems that the second deed will not amount to a revocation of the first conveyance. *Ibid.*

11. A note given by an infant for necessities, is valid. *Per LUMPKIN, J. Butts vs. Cuthbertson. 6 Ga.*..... 166
12. The contracts of infants are not void, but voidable, at the election of the infant, when arriving at full age. *Strain vs. Wright. 7 Ga.*.. 568
13. When an infant purchases property, gives his note for the purchase money, and receives the property into his possession, and after arriving at full age, disaffirms the contract, by a plea of infancy to a suit upon the note: *Held*, that the title to the property revested in the vendor, or his legal representatives, and that the infant should restore the property to the owner, upon a disaffirmance of the contract. *Ibid.*
14. Where an infant had purchased a negro, and paid part of the purchase money, and gave his note for the balance, and took the negro into his possession; and afterwards, to a suit instituted on the note by the vendor, he disaffirmed the contract by a plea of infancy: *Held*, that inasmuch as the remedy of the vendor, under the peculiar facts of the case, to secure the possession of the negro, at Law, was inadequate and difficult, a Court of Equity would entertain jurisdiction, and decree a sale of the negro, and out of the proceeds thereof, reimburse the infant the amount paid by him, and decree the balance to the vendor or his legal representative. *Ibid.*
15. The Statute of Limitations does not run against minors. *Jordan vs. Thornton et al. 7 Ga.*..... 517
16. If one or more tenants in common, in an action of trover, be barred by the Statute of Limitations, and one or more be within an exception in the Statute, their exemption will not relieve against the operation of the Statute as to the one barred; and those within the exception will recover their several interests notwithstanding the bar of the other. *Ibid.*
17. If property belonging to an infant, is converted during his minority, the Statute will commence to run against him upon his arrival at full age, in favor of the *tort feasor*, and those who claim under him, notwithstanding the property be removed without the jurisdiction of the State, unless prevented by some one exception in the Statute, as the *non-residence* of the *tort feasor*. *Ibid.*
18. The Statute 32d Henry VIII. is of force in this State, and a deed made by an infant while under age, will not be avoided by the execution of a deed after he arrives at the age of twenty-one, when the pos-

- session of the land is held adversely to him, but the latter deed will be void under the Statute. *Harrison vs. Adcock et al.* 8 Ga..... 68
19. The *interest* of infants, as contemplated by the Act of 1817, against which the Statute of Limitations does not run, must be such an interest as will enable them to maintain an action in their own name by their guardian. *Pendergrast et al. vs. Foley, Adm'r.* 8 Ga..... 1
20. Where the executor or administrator is barred from bringing suit for *personal* property belonging to the testator or intestate, the infant *cestui que trust* is barred also. *Ibid.* See also, *Worthy et al. vs. Johnson.* 10 Ga. 358. *Aliter* as to *realty.* *Lessee of Cofer vs. Flanagan.* 1 Kelly..... 533
21. An adverse possession held during the minority of the true owner, cannot operate against his right. *Whittington vs. Lessee of Wright.* 9 Ga..... 23
22. A minor whose parents are in life, and who has a separate estate, held to be an *orphan* in the meaning of the Act of 1799, "entitled an Act for the better protection and security of orphans and their estates," and entitled to the preference therein given to orphans. *Ragland vs. The Justices, &c.* 10 Ga..... 65
23. The saving in the Statute of Limitation in behalf of infants may preserve the right of one of several co-heirs, who is within the proviso, although the other co-heirs who were under no disability, may be barred. *Lessee of Pendergrast vs. Prather et al.* 10 Ga..... 218
- INFERIOR COURT. See *Courts, II.*
- INJUNCTIONS. See *Equity, II.*
- INN. See *Tavern License.*
- INQUEST. See *Coroner.*

INSANITY.

1. Where previous insanity is shown, the burthen of proof is thrown on the party who seeks to establish an act as done in a lucid interval. *Griffin vs. Griffin.* R. M. Char..... 217

2. But proof that the act done, was in itself natural and rational, will control evidence of habitual insanity. *Ibid.*
3. If a man has reason sufficient to distinguish between right and wrong in relation to a particular act about to be committed, he is criminally responsible. An exception to this rule, however, is, where in consequence of some *delusion*, the will is overmastered and there is no criminal intent; provided the act itself is *connected with* the peculiar delusion under which the prisoner is laboring. *Roberts vs. The State.* 3 *Kelly*..... 326
4. It is not competent to prove insanity by the reputation of the neighborhood. *Foster vs. Brooks, Adm'r.* 6 *Ga.*..... 287
5. The rule as to "sound and disposing mind," in reference to wills. See *Potts vs. House.* 6 *Ga.*..... 324
6. It is not competent in a criminal case, to prove that the defendant is of weak mind, where it is admitted that he is neither idiot, lunatic, nor insane. *Studstill vs. The State.* 7 *Ga.*..... 2
7. Where a grantor goes into Chancery to avoid his deed, upon the ground of insanity, the burden is upon him to prove it at the time the deed was executed, the law presuming sanity. But if *habitual* insanity is proven previous to the execution of the deed, the presumption of law is, that it continues to the time when the deed is executed; and the burden of proving sanity is devolved upon the other side. *Dicken vs. Johnson.* 7 *Ga.*..... 484
8. In such a case, one is insane who has not strength of mind and reason equal to a clear and full understanding of the nature and consequences of his act, in making a deed. *Ibid.*
9. The Statute of Limitations will run against an insane person, from the time of his restoration to sanity, with knowledge of the existence of the deed. *Ibid.*

INSOLVENT DEBTORS.

1. As to fraudulent assignments by insolvent debtors. See "*Assignments*," III.
2. Under the Act of 1801, and prior to the Act of 1809, the Court tried "in a summary way" the issue of fraud upon the application of an insolvent debtor for a discharge. *Ex parte McAllister.* T. U. P. Char. 223

3. The Inferior Court have authority, under certain circumstances named in the Statute, to discharge an insolvent debtor. But they must do it as a *Court*. An order for discharge, submitted to them individually for their respective signatures out of Court, is insufficient and void. *Woodruff & Co. vs. Dean & Mahony. Dudley*..... 215
4. Upon an issue formed between an insolvent debtor and his creditors, of "fraud or not," the Jury should find the affirmative or negative of the issue. A general verdict of "guilty" is improper and illegal. *Ex parte Simpson. R. M. Charl*..... 111
5. *It seems* that where improper evidence has been received by the Justices of the Inferior Court, on the trial of the issue of fraud; or where the verdict is not conformable to the issue, upon the refusal of said Justices to grant a new trial, a *mandamus* to them will be awarded. *Ibid.*
6. Where an insolvent debtor is discharged in the manner prescribed by the laws of Georgia, the fees of confinement must be paid out of the debtor's property, which he has assigned for the benefit of his creditors. *State vs. Simpson. R. M. Charl*..... 122
7. If there is no such fund, the fees must be paid by the committing creditor. *Ibid.*
8. The confinement of an insolvent debtor, convicted of fraudulent practices, under the insolvent laws of Georgia, is merely a continuation of the confinement under *civil process*; it is not a punishment inflicted for a crime. *Ibid.*
9. If the creditors, at whose instance such debtor, so convicted, is confined, refuse to pay his jail fees, he will be entitled to his discharge. *Ibid.*
10. If one of two parties plaintiff, being partners in trade, takes the benefit of the Insolvent Laws, and returns on his schedule a debt due by judgment, to the firm, and no trustee is appointed in terms of the law, to take charge of the assets returned, no process can be issued for the collection of the judgment. *The State vs. Luckie. Ga. Dec. part I*.... 69
11. A *vested* interest in remainder, is such an estate as should be returned in the schedule of an applicant for the benefit of the Honest Debtors' Act. *Vickers vs. Stone. 4 Ga.*..... 461
12. An appeal does not lie from a verdict rendered upon an issue of fraud, formed under the Act of 1823, called the "Honest Debtor's Act." *Armist vs. Barker. 4 Ga.*..... 170

13. An insolvent debtor may, in a great variety of ways, under the laws of Georgia, give a preference, *bona fide*, to one creditor over others. *McWhorter vs. Wright, Nichols & Co.* 5 Ga..... 555
14. A covenant, by a surety, to pay the debts on which he is surety, is a valuable consideration for a conveyance of property by an insolvent debtor. *Ibid.*
15. A bond executed by a debtor, to appear and take the benefit of the Honest Debtors' Act, for less than twice the amount of the creditor's debt, is *valid* and binding. *Colley vs. Morgan.* 5 Ga..... 178
16. A notice of an application for the benefit of the "Honest Debtors' Act," directed to a firm by their firm name, is sufficient. *Malendy et al. vs. Hungerford.* 5 Ga..... 544
17. If an insolvent debtor, pending suit, runs personal property to another State, for the purpose of defeating his creditor, and there sells it to one who has full knowledge of the fraudulent purpose for which it was removed, the contract will be declared void in the Courts of this State, in a contest between the vendee and creditor. *Watts vs. Kilburn.* 7 Ga..... 356
18. When a defendant is arrested and confined under a *ca. sa.* the fact of giving bond to appear and take the benefit of the "Honest Debtors' Act," does not, in law, discharge his property from execution under a *fi. fa.* *Higgs vs. Huson.* 8 Ga..... 317
19. A defendant arrested under *ca. sa.* and allowed prison bounds, is still in the custody of the Sheriff, and he must place him in confinement at the end of six months, without any special order. *Jackson & Co. vs. Cox.* 9 Ga..... 172
20. Where an insolvent debtor files his schedule at the first term of the Court after his arrest, to take the benefit of the Act of 1823, for the relief of honest debtors, the creditor who desires to traverse the schedule so filed, and to suggest fraud, or concealment of any property, money or effects, not embraced in the schedule, must do so at the first term of the Court after such arrest, and will not be allowed to do so at any subsequent term of the Court thereafter, unless for special and good cause shown to the Court. *Coleman & Starr vs. Dickerson.* 9 Ga.... 551
21. As a matter of practice, the provisions of the Act of 1823 will best be answered by requiring the oath of the insolvent debtor to be spread upon the minutes of the Court and there subscribed by him, and an order entered thereon, reciting his arrest, the names of his creditors who have been legally notified, authorizing his discharge, so that a perfect record may be made for the protection of the debtor, as well as for the information of all persons interested. *Ibid.*

22. A defendant arrested under a *ca. sa.* from a Justice's Court, gave bond for his appearance at the Justice's Court, from term to term, and not to depart thence, without leave of the Court, and was discharged by the Constable: *Held*, that the bond was a nullity, and that the Constable was liable to the plaintiff in *fi. fa.* upon a rule, for the amount of the execution. *Faircloth vs. Freeman.* 10 Ga..... 249

See *Assignment, III.*; *Escape, 4.*

IDIOT, LUNATIC, &c. See *Criminal Law, II.* 31; *Insanity.*

IMPROVEMENTS. See *Damages*; *Ejectment.*

INADEQUACY OF PRICE. See *Equity, I. e.*

INDORSEMENT AND INDORSEER. See *Notice and Demand*; *Promissory Notes II.*; *Surety.*

INSURANCE.

1. An insurance office makes insurance of the life of A, at the instance of B. In the policy, it is stipulated that the premiums shall be paid on the 10th of April, annually and that if they were not then paid, the company should not be liable for the insurance, or any part thereof, and the policy should cease and determine. Printed proposals, purporting to be the terms and conditions of insuring, were put out by the company to persons dealing with them, one article of which was, that "*a party neglecting to settle his annual premium within thirty days after it is due, forfeits the interest he has in the policy.*" No reference is made in the policy to the printed proposals. The premium due on the 10th April, 1847, was not paid at that time; the insured died four days thereafter, and after his death, and within the thirty days, the premium then due, was tendered and refused by the company: *Held*, that the article in relation to the thirty days does not extend the contract of insurance beyond the time designated in the policy for the payment of the premium, and that the company were not liable on the policy. *The Mutual Benefit Life Insurance Co. vs. Ruse.* 3 Ga..... 534

INTEREST.

1. Judgments bore interest prior to the Act giving it. *Ex'rs of Houston vs. Mossman. T. U. P. Charl.*..... 139
2. An acknowledgment of an open account by letter, is such a liquidation of the demand, as will enable the creditor to obtain interest from the date of the acknowledgment. *Hicks & Lord vs. Thomas. Dudley.* 218
3. Where suit was instituted on a bond given for a certain sum of money, and conditioned for the performance of a duty, without any stipulation as to interest, and the Jury, on an issue of fact submitted to them, found the bond declared on to be the deed of defendant, and assessed nominal damages: *Held*, that interest could be awarded on such bond, only in the shape of damages assessed by a Jury. *The Governor vs. Daniel. R. M. Charl.*..... 449
4. *Held*, also, that the verdict rendered, only found the *debt* mentioned in the bond, and as that contained no stipulation for interest, the execution, which had issued for principal and interest, from the date of the bond, was illegal. *Ibid.*
5. The Judiciary Act of Georgia, which directs "that no interest shall be given on any open account, in the nature of damages," does not prohibit a *Special Jury*, on an appeal trial, from assessing damages on the principal sum for a frivolous appeal, though the action was, in its inception, founded on open account, if such Jury are satisfied that the appeal was frivolous and intended for delay only. *Fell vs. Abbott. R. M. Charl.*..... 452
6. Where a verdict has been rendered by a Petit Jury, on an open account, and such verdict has been appealed from, *it seems* that interest can only be computed on such demand, from the verdict of the Appeal Jury. *Ibid.*
7. Upon a penal bond, conditioned for the payment of a *lesser* sum of money, a recovery may be had for the principal and *all* the interest, though it exceed the penalty of the bond. *Moss vs. Wood. R. M. Charl.*..... 42
8. In an action by a surety for money paid, he will be entitled to recover interest, if he was liable to it on the demand which he paid. *Knight vs. Mantz. Ga. Dec. part I.*..... 22
9. Interest may be recovered by an indorser, from the guarantor of a bill. *Hitt & Dill vs. Lippitt. Ga. Dec. part II.*..... 89

10. In a suit upon a note payable upon time, with *interest from date, if not punctually paid*, the back interest is recoverable, as stipulated damages. *Alexander vs. Troutman*. 1 *Kelly*..... 472
11. If, in entering up the judgment, such *back interest* is not computed, the judgment may be afterwards amended under an order of Court, though the original execution had issued and been returned satisfied. *Ibid.*
12. An agent is liable for interest upon money admitted to be in his hands, from the time he received it. *Anderson et al. vs. The State*. 2 *Kelly*..... 373
13. He who has fraudulently received or wrongfully detains the money of another, is chargeable with interest from the time he received it. *Ibid.*
14. An administrator who has been guilty of gross neglect in not making returns, should have interest compounded against him every six years. *Fall, Adm'r, vs. Simmons et al.* 6 *Ga.* 265. See, also, 8 *Ga.* 417
15. The Act of 1814, requiring the principal and interest in judgment, to be stated separately, does not apply to a recovery in damages. *Ray et al. vs. The Justices, &c.* 6 *Ga.*..... 303
16. Judgments rendered prior to the Act of 1845, (reducing interest to 7 per cent.) bear interest at the rate of 8 per cent. *The Mayor, &c. vs. The Trustees, &c.* 7 *Ga.*..... 204
17. Our Statute disallowing interest on open accounts, does not, in any way, affect the law of set-off. *Meriwether et al. vs. Bird*. 9 *Ga.*.... 595
18. In an action brought by a bill-holder against a stockholder, under the 11th section of the charter incorporating the Planters' & Mechanics' Bank of Columbus, for the ultimate redemption of the bills issued by the bank: *Held*, that the stockholder was only liable to pay interest on the bills from the time of demand of payment thereof, made by the bill-holder of the stockholder, and not from the time of demand on the bank. *Lane vs. Morris*. 10 *Ga.*..... 162

See *Damages*, 3; *Partners*, II. 9, 10; *Usury*.

INTERROGATORIES. See *Evidence*, III.

IRWINTON BRIDGE COMPANY. See *Constitutional Law*, IV. 2, 3, 17.

JAIL. See *Costs*, II. 5; *Savannah*, 1, 9.

JAIL FEES. See *Habeas Corpus*.

JOINT CONTRACTORS AND CO-PARTNERS. See *Partners*, I. 7; *Pleading*.

JUDGE.

1. A Judge cannot originate a case at Chambers, and give judgment thereon, unless the authority is expressly conferred by law; but on a motion originating in term, by order, judgment may be rendered at Chambers, in vacation. *Watson, Ex'r, vs. Jones.* 1 *Kelly*..... 303
2. No man can be a judge in his own case. *Milnor vs. Ga. R. R. & B'k'g Co.* 4 *Ga*..... 385
3. It is the right and duty of counsel to bring to the notice of the Court, all such questions of law as he may think necessary to be determined, in order to secure the rights of his client; and it is the right and duty of the Court to determine any principle of law which he may think applicable to the case, whether suggested by counsel or discovered by his own knowledge and observation. *Moody and Wife vs. Davis.* 10 *Ga*..... 403
4. Chancery jurisdiction in this State, is conferred upon the Superior Courts and not the Judges thereof. *Arrington vs. Cherry.* 10 *Ga*... 429
5. The fact that the presiding Judge was, previous to his election, the attorney of one of the parties, does not make him *interested*, in the sense of the Act of 1801, authorizing the Justices of the Inferior Court to preside in certain cases. *Lloyd vs. Smith.* T. U. P. *Charl*..... 143

See *Charge of the Court; New Trials, V.*

JUDGMENTS.

- I. GENERALLY: AND HEREIN OF VOID JUDGMENTS.
- II. CONCLUSIVENESS AND EFFECT OF: AND HEREIN OF FORMER RECOVERY.
- III. LIEN OF.
- IV. FOREIGN JUDGMENTS.
- V. ACTION ON JUDGMENTS.
- VI. DORMANT JUDGMENTS: AND REVIVAL THEREOF.
- VII. ARREST OF JUDGMENT.

As to SATISFACTION OF, see *Execution, III.*
 As to TRANSFERS OF, see *Execution, IV.*
 As to INTERFERENCE BY EQUITY, see *Equity, I. a, and I. i.*
 As to SET-OFF OF JUDGMENT, see *Set-off, 12.*

I. GENERALLY: AND HEREIN OF VOID JUDGMENTS, &c.

1. The practice of entering up judgments, *de bonis testatoris et si non de bonis propriis*, is contrary to law. *Janes vs. Robinson. Dudley.....* 1
2. If an appeal be entered from the verdict of the Petit Jury, an omission to enter up judgment within *four* days, will not defeat the verdict, upon such appeal being dismissed or withdrawn. *Kane vs. Hills. R. M. Charl. 103. See, also, Hardee et al. vs. Stovall, &c. 1 Kelly..* 95
3. The judgment may be filed, *nunc pro tunc*, after the appeal is set aside. *Ibid.*
4. The dismissal or withdrawal of an appeal, is a judgment of the Court, remitting all parties to the condition and rights which they occupied and held at the time the appeal was entered. *Hardee et al. vs. Stovall, Simmons & Co. 1 Kelly.....* 95
5. An entry of confession of judgment on the declaration of file in the Clerk's office, is sufficient (in the absence of all proof to discredit the memorandum,) to authorize the Court wherein it was made, to have it transcribed on its minutes, at any subsequent term, in order to preserve their harmony. *Davis vs. Barker. 1 Kelly.....* 560
6. No notice to the defendant is necessary to warrant an application to the Court, to enter such confession, *nunc pro tunc. Ibid.*
7. Is it necessary that a confession of judgment, which is the act of the party only, should appear on the minutes? *Quere. Ibid.*

8. If, in entering up judgment, a part of the interest is omitted, the judgment may be afterwards amended so as to include the interest, and the collection of it enforced, although the original execution had been returned satisfied. *Alexander vs. Troutman.* 1 *Kelly*..... 469
9. If A, as heir of C, recovers of B, the administrator, a judgment for his distributive share, and afterwards sues D, as surety on the administration bond, and recovers a judgment for a less sum against him, and collects it, the first judgment is not merged in the latter, and the payment in full of the latter does not operate as an extinguishment of the former, but as *satisfaction pro tanto*, only. *Guerry vs. Perryman & Dennard.* 2 *Kelly*..... 64
10. The discretion of a Judge refusing to amend a judgment after the lapse of nine years, will not be controlled by the Supreme Court. *Saffold vs. Keenan.* 2 *Kelly*..... 344
11. A judgment in attachment may be set aside in a Court of Law, upon an issue suggesting fraud or want of consideration, tendered by a judgment creditor of the defendant in attachment. *Smith vs. Gettinger and another.* 3 *Kelly*..... 141
12. Where two judgments are obtained in different Courts, by the same plaintiff, against the same defendant, for the same cause of action, a satisfaction of either may be shown, on motion made for that purpose, in discharge of the other. *Tarver vs. Rankin.* 3 *Kelly*..... 214
13. Parol satisfaction of a judgment may be shown, even when the payment was for a less sum than the whole amount due, provided it was actually received and accepted in full satisfaction of the judgment. *Ibid.*
14. The relation of principal and surety continues after judgment against them. *Curan vs. Colbert.* 3 *Kelly*..... 250
15. As a general rule, a defendant must have notice, actual or constructive; otherwise no valid judgment can be rendered against him. To this there are several exceptions: 1st. The Legislature may, by express Statute, dispense with notice. 2d. Notice before judgment is not essential where the Statute itself provides specific means of relief. *Flint River Steamboat Co. vs. Foster.* 5 *Ga*..... 194
16. There is no Statute Law of Georgia which authorizes citizens of a foreign State to be made parties to proceedings in our Courts without their consent, and to conclude them by a judgment *in personam*. *Dearing vs. The Bank of Charleston.* 5 *Ga*..... 497
17. A judgment obtained in a County where the defendant does not re-

- side, by an acknowledgment of service and jurisdiction by the defendant, is void as against subsequent judgment creditors. *Ga. R. R. & B'g Co. vs. Harris et al.* 5 *Ga.*..... 527
18. After a cause has been submitted to a Petit Jury, either party has the right to confess judgment, reserving the liberty of appeal, with or without the consent of the other party. *Hicks vs. Ayer.* 5 *Ga.*..... 293
19. The Act of 1814, requiring the amount of principal and interest to be stated separately in judgments, applies to suits on promissory notes and other special contracts bearing interest, and not to cases where the recovery is in damages. *Ray, Adm'r, et al. vs. The Justices, &c. Macon Co.* 6 *Ga.*..... 303
20. A judgment *quando* binds all the estate of the defendant's testator or intestate, except such as was in the hands of the representative at the time of the judgment, or such as had been previously administered by him; and *third* persons cannot take advantage of the *form* of the judgment to screen property in their hands from liability. *Allen vs. Matthews.* 7 *Ga.*..... 149
21. Judgments rendered prior to the Act of 1845, (reducing the rate of legal interest,) bear interest at the rate of 8 per cent. *The Mayor, &c. vs. The Trustees, &c.* 7 *Ga.*..... 204
22. In a suit against an executor or administrator, in his representative character, the judgment must be *de bonis testatoris*, except when he pleads *ne unques executor*, or a *release to himself*, and the pleas are found against him. *The Justices vs. Sloan.* 7 *Ga.*..... 31
23. The judgment of a Court that has no jurisdiction, is entirely void. *Rogers vs. Evans.* 8 *Ga.*..... 143
24. Where a cause has been continued, and at the same term the plaintiff tenders a confession of judgment for costs, which the defendant refuses to accept, or the Court to allow, on the ground that the case had been continued, but the confession was nevertheless entered by the Clerk, by the direction of plaintiff's attorney: *Held*, that the confession was a nullity. *Barefield vs. Bryan.* 8 *Ga.*..... 463
25. A judgment rendered in the appellate Court, against the parties not appealing, is irregular, and should be vacated. *Allison vs. Chaffin.* 8 *Ga.*..... 390
26. A judgment rendered by a Court without jurisdiction, is a mere nullity, and may be so held, wherever, and whenever, and in whatever way it is sought to be used as a valid judgment. *Towns, Gov. use, &c. vs. Springer et al.* 9 *Ga.*..... 130

27. Where a judgment has been rendered by a Court having jurisdiction of the subject-matter, and the party against whom it was rendered, such judgment is not void, although the Court rendering it may have erred as to the law—there being no appeal therefrom on account of such error in law, or other irregularity in obtaining such judgment. *Preston vs. Clark.* 9 Ga..... 244
28. A judgment rendered by a Court having no jurisdiction of the person and subject-matter, is a mere nullity, and may be so held in any Court, where it becomes material to the interest of the parties to consider it. *Biggers, Mobley et al. vs. Mobley, Adm'r, &c.* 9 Ga..... 247
29. The judgment of a Court having jurisdiction, may be set aside by a decree in Chancery, for fraud or accident, or the act of the adverse party, unmixed with negligence or fault in the complainant. *Ibid.*
30. A judgment which is void for want of jurisdiction in the Court rendering it, cannot, of itself, be noticed for any purpose. *Beverly and another vs. Burke.* 9 Ga..... 440
31. A judgment at Law cannot be impeached collaterally in a Court of Equity. *Redwine vs. Brown et al.* 10 Ga..... 311
32. Where a *fi. fa.* had issued in pursuance of a judgment of a Court of general jurisdiction: *Held*, that such judgment could not be *collaterally* attacked, by attacking the *fi. fa.* but in order to get the *fi. fa.* out of the way of junior creditors, the attack must be *directly* made upon the judgment, by an issue tendered for that purpose, where the object is to impeach such judgment on the ground of fraud. *C. & G. H. Kelsey & Halsted et al. vs. Wiley, Parish & Co.* 10 Ga..... 371
33. In regard to Courts of general jurisdiction, the rule is, that nothing will be intended to be out of their jurisdiction but that which *specially* appears to be so; and when such a Court has rendered a judgment in relation to any subject-matter within its jurisdiction, the presumption is, that it had before it sufficient evidence to authorize it to award such judgment, which judgment will be conclusive until reversed or impeached for fraud. *Ibid.*
34. A judgment is presumed to be paid after twenty years; this presumption may be rebutted. *Burt vs. Casey.* 10 Ga..... 178
35. An agreement *never* to enforce a judgment, releases the same, but for a *specified time*, does not; and if the judgment is pressed within that time, the defendant's remedy is on the contract. *Chambers vs. McDowell.* 4 Ga..... 185

II. CONCLUSIVENESS AND EFFECT OF: AND HEREIN OF FORMER RECOVERY.

1. To determine whether a former recovery is a good bar to a subsequent action, a good test is, whether the same evidence will support both actions. *Crockett vs. Routon. Dudley* 255
2. If the parties, the subject-matter of the suit and the evidence be the same, the former recovery is a bar. *Ibid.*
3. A judgment is only *prima facie* evidence against one who was not a party or privy, and who had no notice of the action in which it was rendered, nor opportunity of defence, nor of appeal. *Brown vs. Chaney. 1 Kelly* 412
4. Thus, where A endorses a note to B, "to be liable only in the second instance," and B sues C, one of the makers, who pleaded a release from A, and is discharged by the judgment of the Justice's Court, that judgment is only *prima facie* evidence at best, in a subsequent suit against A. To make it conclusive, notice to A of the first suit, was indispensably necessary. *Ibid.*
5. A judgment at Law, unless reversed, is conclusive upon the defendant in every other Court, even as to matters of defence, which he might have presented, but neglected to produce at the proper time, and this too notwithstanding the Court erred in the law. *Kenan & Rockwell vs. Miller. 2 Kelly* 329
6. There must be *fraud, surprise* or some *extraordinary and uncontrollable* circumstances, where manifest injustice has been done, to authorize a Court of Equity to grant relief against a judgment at Law. *Pearce & Co. vs. Chastain. 3 Kelly* 229
7. With notice to the surety or other party liable over, of the first suit, the judgment therein is conclusive against him. Without such notice, it is *prima facie* evidence only, of liability. *Napier vs. Neal. 3 Kelly* 301
8. A judgment in favor of a defendant, and afterwards set aside by the same Court, is no bar to a subsequent suit between the same parties, for the same cause of action. *Taylor vs. Smith. 4 Ga.* 133
9. Where a Court has jurisdiction of the person and the subject-matter of the suit, and the defendant has some privilege which exempts him from the jurisdiction, he may waive the privilege; and if he acquiesces in the jurisdiction, and confesses judgment to the plaintiffs, the

- Court will not, on that ground, set aside the judgment, after a lapse of five years. *Bostwick, Adm'r, vs. Perkins*. 4 Ga..... 47
10. Judgments are binding and conclusive between parties and privies, until reversed or set aside, and cannot be collaterally questioned by third persons, except on the ground of fraud and collusion in their procurement. *Hammock vs. McBride*. 6 Ga..... 178
11. Creditors and *bona fide* purchasers may attack a judgment for fraud whenever it interferes with their rights, either at Law or in Equity. *Ibid*.
12. A executed his bond to B, conditioned to make him a title to a tract of land therein described, whenever the litigation then pending, respecting it, should terminate. B brought suit on the bond, alleging a forfeiture thereof, in which there was a verdict and judgment for the defendant, upon the "general issue:" Held, that the former recovery was no bar to another action, and that parol evidence was admissible to show that on the first trial, no other issue was submitted to the Jury, save only as to the fact of the pendency of the litigation referred to in the bond, and that the testimony was restricted exclusively to that point. *Ezzell vs. Maltbie & Winn, Ex'rs*. 6 Ga..... 495
13. Where a plea of former recovery is filed, and the record tendered to support the plea, it is for the Court to determine, upon inspection and comparison, whether the cause of action is the same; and if not the same, the record will be repelled; and if it is admitted, it then also becomes a question for the Court, how far, and when, parol evidence will be admitted, to show that the cause of action was not submitted and passed upon in the former trial. *Hill and another, Adm'rs of McFarland, vs. Adm'rs of Freeman*. 7 Ga..... 211
14. A former recovery between the same parties, although not an absolute bar to another suit, may, nevertheless, be conclusive upon some of the matters involved in the second action. *Christian vs. Penn*. 7 Ga..... 434
15. Upon the trial of a claim case, where the claimant claims through a judgment of foreclosure, on a mortgage made by the defendant in *fi. fa.* to his vendor, the plaintiff in *fi. fa.* may impeach the judgment and mortgage, and prove it fraudulent on the trial. *Williams, Adm'r, vs. Martin*. 7 Ga..... 377
16. Where the Court has jurisdiction of the cause and the parties, and only proceeds erroneously, the judgment, notwithstanding such error, is binding until it is vacated or reversed. *Rogers vs. Evans*. 8 Ga.. 143
17. Upon an affidavit of illegality, the validity of the judgment cannot be attacked. *Ibid*.

18. The judgment of a Court of competent jurisdiction, is conclusive as to the facts which it decides, until reversed or set aside; and such judgment cannot be collaterally impeached or contradicted, by evidence which such judgment declares to have been *cancelled and annulled*. *Wiley, Parish & Co. vs. Kelsey, Halsted & Co.* 9 Ga..... 117
19. The judgment of a Court of competent jurisdiction cannot be attacked collaterally, in any other Court, for *irregularity*, and in all Courts is to be taken and held as a valid judgment, until it is reversed or vacated. *Biggers et al. vs. Mobley, Adm'r.* 9 Ga..... 247
20. The judgment of a Court of competent jurisdiction may be set aside by the Court which rendered it, for fraud and irregularity. *Ibid.*
21. Upon a proceeding instituted before the Court of Ordinary, to reverse a judgment discharging an administrator, it is competent to prove a fraud upon the Court, in procuring the judgment of discharge, by proof of representations by the administrator, upon which the Court acted, that he had fully and faithfully settled the estate and executed his trust, and by proof of acts which falsify those representations. *Ibid.* See, also, *Loyless vs. Rhodes and another, Ex'rs.* 9 Ga..... 547
22. The pendency of a writ of error does not impair or affect the judgment of the Superior Court until reversed. If *affirmed* it is binding *ab initio*. *Allen, Ball & Co. vs. The Mayor, &c.* 9 Ga..... 286
23. When a public trust or duty is required to be done by a *definite* number of persons, a *majority* may act—as where five commissioners were appointed by the Inferior Court of Marion County, to assess the depreciation of property in the Town of Tazewell, caused by the removal of the County site therefrom: *Held*, that three commissioners were competent to act and make the assessment. *Beall, Treas. vs. The State ex rel. &c.* 9 Ga..... 367
24. Where a special jurisdiction is conferred by the Legislature on commissioners, for the purpose of ascertaining certain facts which they are required to certify, and they do so certify, their certificate is the evidence of their judgment, and is as conclusive as any other judgment upon the particular question submitted to them: it appearing upon the face of such certificate, that they acted within the jurisdiction conferred upon them by the Statute. *Ibid.*
25. Where a judgment is rendered against the Sheriff, for the official misconduct of his deputy, the deputy himself being present in Court and making a return to the rule, he is concluded by the judgment, in an action against him by the principal for re-imbursement. *Holley vs. Wallace et al.* 10 Ga..... 158

26. How far is the surety of the deputy, who had no judicial notice of the proceeding, bound? *Quere.*
27. When a party, liable over as transferor to the transferee of a promissory note, is notified of a plea of failure of consideration, filed to a suit by the transferee thereon, the transferee is a privy in law to the judgment thereon, and is concluded thereby. And if afterwards, the transferor is proceeding at Law to enforce securities against the transferee, taken in payment for the note, Equity will relieve by injunction and decree. *Bulloch vs. Winter.* 10 Ga..... 214
28. A judgment at Law, cannot be impeached collaterally in a Court of Equity. *Redwine vs. Brown et al.* 10 Ga..... 311
29. Where a *fi. fa.* had issued in pursuance of a judgment of a Court of general jurisdiction: *Held*, that such judgment could not be collaterally attacked by attacking the *fi. fa.*; but in order to get the *fi. fa.* out of the way of junior creditors, the attack must be *directly* made upon the judgment, by an issue tendered for that purpose, where the object is to impeach such judgment on the ground of fraud. *C. & G. H. Kelsey & Halsted et al. vs. Wiley, Parish & Co.* 10 Ga..... 371
30. It is not enough that there was a remedy at Law, to make the judgment at Law a bar; it must be shown, not only that the matter alleged in the bill *might* have been set up by way of defence, but that it would have been as practical and efficient to the ends of justice and its prompt administration, as the remedy in Equity. *Hollingshead, Adm'r, &c. vs. McKenzie.* 8 Ga..... 457

See *Autrefois acquit.*

III. LIEN OF.

- 1, The Act of 19th December, 1822, which protects the property of a debtor from levy under a judgment, where such property, for a definite period, had been in the possession of a *bona fide* purchaser without notice, may be properly construed to refer only to such judgments as were obtained since its passage. *Forsyth vs. Marbury.* R. M. Ch. 324
2. A creditor who had obtained judgment against one partner, in his individual capacity, which judgment was anterior to the copartnership, has the right to levy on the partnership's effects and to sell his debtor's interest therein, without reference to the claims of the creditors of the firm. *Ex parte Stubbins & Mason.* R. M. Charl..... 77
3. Such judgment being a lien on all the property of the debtor, which he had at the time of the signing thereof, or which he might thereafter acquire, supersedes the claims of all subsequent creditors. *Ibid.*

4. A judgment creditor who has given indulgence to his debtor for 1, 2 and 3 years, upon a mortgage, being executed by a third person to secure the payment of such judgment, has a right to proceed on his judgment to collect the instalments as they become due. *Norris vs. Ham et al. R. M. Charl.*..... 267
5. A judgment in Georgia, constitutes a lien on all the property of the debtor, and is constructive notice to all the world. *Forsyth vs. Marbury. R. M. Charl.*..... 324
6. And this lien is effectual against all subsequent claims to the property, derived from and through the debtor. *Ibid.*
7. *Query.* If such lien is retained on property of debtor sold under a junior judgment, or attaches itself solely on proceeds of sale? *Ibid.*
8. Property once sold under execution, is not liable again to executions against the same defendant, without proof that the title has reverted in him. *Collins vs. Pace. Ga. Dec part II.*..... 160
9. But is so liable when the defendant again acquires title to it. *Howard and another vs. Jones et al. Ga. Dec. part II.*..... 190
10. A judgment lien is not extinguished by an appeal being taken, but suspended. *Hardee et al. vs. Stovall, Simmons & Co. 1 Kelly.*..... 95
11. As between attachments and ordinary suits, the *judgment*, and not the *levy* of the attachment, fixes the lien. *McDougald vs. Barnard. 3 Kelly.*..... 173
12. If A buy land of B, and pay down the entire consideration or purchase money, and take an unconditional bond for titles, and there is nothing more for him to do in order to consummate the contract, B is a mere naked trustee, and the legal estate vests in A; if not under the 27th Henry VIII. commonly called the Statute of Uses, yet it comes within section 10 of the 29th Charles II. chapter 3, and is subject to levy and sale on an execution and judgment at Law against A. *Pitts vs. Bullard. 3 Kelly.*..... 5
13. The lien of a judgment controlled by a surety, under the Act of 1831, dates back to the rendition of the judgment, and not from the order giving control. *Bailey vs. Mizell. 4 Ga.*..... 123
14. A plaintiff having two executions in the hands of the Sheriff, which are liens on money arising from the sale of defendant's property, cannot apply the fund to the *younger*; but the law will appropriate it to the older. *Newton vs. Nunnally. 4 Ga.*..... 356

15. Taking *collateral* security, does not release a judgment. *Chambers vs. McDowell.* 4 Ga..... 185
16. Where a judgment was rendered against an intestate in his life-time as principal, and his surety, and the surety has paid off the same since the death of the intestate: *Held*, that such payment, under the Statute of this State, had relation to the date of the judgment, so as to enable the surety to remunerate himself out of the property of the principal. *Ray, Adm'r, vs. Dennis.* 5 Ga..... 357
17. A judgment has no lien on promissory notes in the hands of the defendant; nor are *choses in action* liable to be seized and sold under execution, unless made so specially by Statute. *McGehee vs. Cherry.* 6 Ga..... 550
18. A defendant in *fi. fa.* has the right to transfer promissory notes in his possession to other than judgment creditors, in satisfaction of their claim. *Ibid.*
19. A obtains a judgment *quando, &c.* against B, the administrator of C. D gets an absolute judgment against B, administrator, for the surplus estate in his hands, coming to D, as the only heir and distributee of C. E, the surety of B, upon his administration bond, pays off the judgment of D: *Held*, that A has no right to subject this money in the hands of D, to the satisfaction of his judgment *quando.* *Cairns vs. Iverson.* 3 Kelly..... 132
20. A judgment *quando* binds all the estate of the defendant's testator or intestate, except such as was in the hands of the representative at the time of the judgment, or such as had been previously administered by him; and *third* persons cannot take advantage of the *form* of the judgment, to screen property in their hands from liability. *Allen vs. Matthews.* 7 Ga..... 149
21. When a judgment lien has attached on personal property, which is removed by the defendant in execution to another State and sold, it may be levied on and sold under execution, if brought back again to this State. *Watts vs. Kilburn.* 7 Ga..... 356
22. Seven years' peaceable possession of land since 1822, by a *bona fide* purchaser, without notice of a judgment, will protect the purchaser against the lien of a judgment obtained prior to 1822. *Griffin vs. McKenzie and another.* 7 Ga..... 163
23. The Act of 1822, which declares that "where an appeal is entered from the first verdict, the property of the party against whom the verdict is rendered, shall not be bound, except from the signing of the judgment on the appeal, except so far as to prevent the alienation by

- the party of his, her, or their property, between the signing of the first judgment and the signing of the judgment on the appeal," is intended only to prevent the alienation of property by the defendant, pending the appeal, to the injury of the plaintiff: *Held*, that under this Act, two judgments being obtained in favor of two plaintiffs at the same term, against the same defendant, upon one of which only, an appeal is entered, and pending that appeal, the defendant aliens his property, which is finally brought to sale after a judgment on the appeal, the judgment on the appeal is not entitled to share in the distribution of the fund with the judgment at Common Law, upon which no appeal was entered. *Snelling vs. Parker and another.* 8 Ga..... 121
24. The judgment of a Court that has no jurisdiction of a cause, is entirely void. *Rogers vs. Evans.* 8 Ga..... 143
25. Where the Court has jurisdiction of the cause and parties, and only proceeds erroneously, the judgment, notwithstanding such error, is binding until it is vacated or reversed. *Ibid.*
26. A and B both have judgments open against C, and a fund raised from C's property is before the Court for distribution; B's judgment is the oldest, but has been levied upon land which has been claimed by a third person, and a verdict rendered in favor of the claimant: *Held*, that the levy on the land does not affect the lien of B's judgment on the fund. *Lowe et al. vs. Moore and another.* 8 Ga..... 194
27. In such a case, the Court has no right to impose terms upon B, to wit: That he should take the money, if he would dismiss his levy on the land, or agree not to appeal from the verdict rendered against him in the claim case. *Ibid.*
28. The lien of a judgment no longer attaches to property sold by the Sheriff under a younger judgment. The remedy of the creditor is to claim the fund. *Harrison vs. McHenry.* 9 Ga..... 164
29. Judgments of the Circuit Court which are affirmed, do not lose any lien or priority by reason of the proceedings in the Supreme Court. *Allen, Ball & Co. vs. The Mayor, &c.* 9 Ga..... 286
30. The rule that the joint estate is to discharge the joint debts in the first place, and the separate estate the separate debts, and that neither can invade the funds of the other, until the particular class of debts is satisfied out of it, considered and questioned. *Cleghorn vs. The Insurance Bank of Columbus.* 9 Ga..... 319
31. Even admitting the rule, as a principle of general Equity, it will not be enforced to the exclusion or postponement of the joint creditors, so long as they have recourse at Law against the separate estate. *Ibid.*

32. It is only when the legal recourse of the joint creditors against the separate estate is terminated, and they have no claim against those assets, except in Equity, as in case of the death, bankruptcy, (or perhaps statutory assignment in insolvency,) of a partner, that the joint creditors are postponed. *Ibid.*
33. Where judgments were obtained against a husband prior to his marriage, and his estate is insolvent: *Held*, on the death of the husband, the wife is entitled to dower in his lands which have not been sold under the judgment; that the judgment created a *lien* on the lands, but the *seizure* was not divested until levy and sale. *Green, Adm'r, vs. Causey*. 10 Ga..... 435
34. If P. a purchaser at Sheriff's sale, agrees with W. the defendant in *fi. fa.* that the latter may redeem the property by paying the purchase money back to P. and W. pays a part, and subsequently, within a reasonable time, does pay, or offers to pay the balance, he acquires a title to the property which will subject it to levy and sale as his property. But if after such an agreement, and after the payment back of a part only of the purchase money, P. and W. together with others, or by themselves, enter into a new contract, by which P. agrees to convey the property to a third person, and W. is to pay back to P. the purchase money, and to have satisfaction entered upon a judgment against him, held by this third person, this new contract is valid, and the property is not subject to the lien of a judgment against W. *Dowdell vs. Neal*. 10 Ga..... 148
35. A sale of property under a junior judgment and execution, passes the title, as against the lien of older judgments. *Ibid.*
36. If a judgment creditor files his bill to enforce a trust executed by his debtor, for the benefit of his creditors generally, it is a virtual waiver of his legal lien. *Jones vs. Dougherty*. 10 Ga..... 273

See *Administrators, &c. V.; Mortgages; Sales, II.* 3.

IV. FOREIGN JUDGMENTS.

1. Debt on foreign judgment, with a single count, is not amendable by inserting a count on the original cause of indebtedness, on which the judgment is founded. *Latine vs. Clements, Adm'r*. 3 Kelly..... 427
2. An action will lie against an administrator with the will annexed, in Georgia, on a judgment obtained in Virginia against an executor. *Ibid.*
3. A judgment obtained in another State, has in this State, the force and

effect of a domestic judgment; yet it may be here impeached for fraud, and the jurisdiction of the Court which rendered it, inquired into.

Davis et al. vs. Smith et al. 5 Ga..... 274

4. A judgment properly rendered in another State, with an eviction under it, is evidence of a breach of warranty in Georgia. *Ibid.*

5. The second section of the Act of 1805, limiting suits on judgments obtained in other States, to be brought within five years, is still in force. *Br. Bk of Alabama vs. Kirkpatrick.* 5 Ga..... 34

See *Record*, 2.

V. ACTION ON JUDGMENTS.

1. One judgment may be set-off against another, although all the parties to the different records are not the same. *Colquitt vs. Bonner.* 2 *Kelly* 155

2. Debt on foreign judgment, with a single count, cannot be amended by inserting a count on the original cause of indebtedness on which the judgment is founded. *Latine vs. Clements, Adm'r.* 3 *Kelly*..... 427

3. An action will lie against an administrator, with the will annexed, in Georgia, on a judgment obtained against the executor in Virginia. *Ibid.*

4. The action of debt lies upon a dormant judgment in this State. *Lockwood vs. Barefield.* 7 Ga..... 393

VI. DORMANT JUDGMENTS, AND REVIVAL THEREOF.

1. A *sei. fa.* to revive a judgment in favor of C. T. and E. should be brought in the name of all the plaintiffs, unless some legal reason be given on the record why a portion should be entitled to revive the judgment. *Adm'r of Sheftall vs. Clay.* T. U. P. *Charl.*..... 231

2. Under the Act of 1823, relative to dormant judgments, there should be an entry every seven years, showing diligence on the part of the plaintiff or owner, or the judgment is void. *Stone vs. Head et al.* *Dudley* 166

3. If an execution is not barred under the Dormant Judgment Act, at the time it comes into Court to claim money, the Statute cannot subsequently attach, pending the litigation respecting the distribution of the fund. *Wiley et al. vs. Kelsey et al.* 3 *Kelly*..... 275

4. Under the Acts of 1822 and 1823, to prevent the fraudulent enforcement of dormant judgments and executions, a return must be made by the proper officer on such execution every seven years, or it will be presumed to have been satisfied and fraudulently kept open. *Booth vs. Williams.* 2 *Kelly*, 253. See, also, *Ga. Dec. part II.*..... 227
5. A surety who has paid a judgment against himself and his principal, which appears to be dormant, is entitled to an order giving him the control of the same, to test his right to use the same for his remuneration. *Davenport vs. Hardeinan.* 5 *Ga.*..... 580
6. The assignee of a judgment which has become dormant, may revive the same in the name of the original plaintiff, for his use. *The Mayor, &c. vs. The Trustees of Bibb County Academy, &c.* 7 *Ga.*..... 204
7. Judgments on the foreclosure of mortgages, are not within the Act of 1823, which declares null and void all judgments on which no execution has issued; or if issued, upon which no return has been made within seven years. *Butt, Trustee, vs. Maddox.* 7 *Ga.*..... 495
8. An entry on a *f. fa.* by the Sheriff of any County in Georgia, is a sufficient compliance with the Act requiring a return within seven years, by the proper officer for executing the same. *Duncan vs. Webb and Foster.* 7 *Ga.*..... 187
9. If any one is injured by the false or fraudulent return of the officer, he has his remedy. *Ibid.*
10. The decrees of a Court of Equity are embraced within the Dormant Judgment Act of 1823. *Curry vs. Piles.* 8 *Ga.*..... 32
11. An execution which has been levied, and upon which is an entry by the Sheriff, of "*levy indefinitely postponed by the plaintiff's attorney,*" is sought to be enforced by a sale of the property levied on more than seven years after the date of the entry: *Held*, to be void upon illegality put in by defendant, under the Act of 1823. *Smith & Merritt vs. Dickson and another.* 9 *Ga.*..... 400
12. A judgment is presumed to be paid after twenty years. This presumption may be rebutted. *Burt vs. Casey.* 10 *Ga.*..... 178
13. Where the following entries appeared on an execution: "*Levied the within f. fa. on lot of land, No. not known, (describing the land,) levied on as the property of J. H. B. September 27, 1842.*" "*The above levy stopped by order of plaintiff's attorney, November 2d, 1842, E. J. C. Sheriff:*" *Held*, that the two entries taken together, were such a return on the execution, as took it out of the Dormant Judgment Act of 1823. *Moore vs. Ramsey.* 10 *Ga.*..... 184

14. *Scire facias* to revive a judgment, must issue from, and be returnable to the Court of the County in which the judgment was obtained, and service must be perfected, when the defendant or defendants reside out of the County, by sending out process to the County where they respectively reside, directed to the Sheriff of that County, whose duty it is to serve them personally and return the process. *Dickinson vs. Al-lison*. 10 Ga..... 557
15. *Scire facias* to revive a judgment, held not to be an original action, but a continuance of the suit in which the judgment was obtained. *Ibid*

VII. ARREST OF JUDGMENT.

1. Non-residence must be pleaded, and cannot be taken advantage of on motion in arrest of judgment before the Superior Courts of this State. *Slaughter et al. vs. Thompkins*. *Dudley*..... 117
2. A defendant in a judgment recovered under a special Statute, is not precluded of his right to a motion to quash the proceedings, or arrest the judgment, because the Act points out the mode of contesting the amount due. The motion admits the facts charged, but insists, that *from the pleadings it does not appear*, that the plaintiff has any cause of action against the defendant. *Robinson vs. Steamer Lotus*. 1 Kelly 317
3. When the verdict of the Jury is regularly returned on the indictment, but by the neglect of the Clerk is not entered on the minutes of the Court, at the term at which it was rendered, this affords no ground for arresting the judgment. The Court may, at the next succeeding term, order the verdict of the Jury to be entered, *nunc pro tunc*. *Hall vs. The State*. 3 Kelly..... 28
4. A declaration with the common counts for money had and received, and for money paid, laid out, and expended, without specification by bill of particulars, or otherwise, on what account specially it was received or paid out, is defective; but being cured by verdict is not good in arrest of judgment. *Dill et al. vs. Jones*. 3 Kelly..... 79
5. If judgment is entered against joint defendants, when one of them is dead at the time, the judgment will be reversed for error as to all of them. *Tedlie vs. Dill*. 3 Kelly..... 105
6. It appearing from the statement on the face of the indictment, that the Grand Jury were sworn, it is not competent, on a motion in arrest of judgment, to disprove the recital by *aliunde* testimony. *Terrel vs. The State*. 9 Ga..... 58

7. Where a bill was filed by John A. Rarden and Henrietta, his wife, (formerly Henrietta Ogletree,) to recover certain slaves in right of his wife, and the Jury on the trial of the cause, found the following verdict: "We the Jury find and decree, that the complainant, Henrietta G. Rarden, (formerly Henrietta G. Ogletree,) in her own right, and for her own use, do recover of the defendant the negro slaves, &c." *Held*, on a motion in arrest of judgment, on the ground that the verdict did not find in favor of the marriage of the parties, which was denied by the defendant's answer, that the legal effect of the verdict was in favor of the marriage. *Simmons et al. vs. Rarden and Wife.*
9 Gu...... 543

See *Jury*, II. 1.

JURISDICTION.

1. An Inferior Court is not bound to notice a want of jurisdiction, unless it be pleaded. *Davis vs. Matthews. T. U. P. Charl.*..... 111
2. A City Court or corporation authorities, cannot punish for indictable offences; the Superior Court having *exclusive* jurisdiction, under the Constitution. *State vs. Mayor, &c. Savannah. T. U. P. Charl.*..... 237
3. In a City Court, whose jurisdiction is limited to a certain amount, a set-off which exceeds such amount, cannot be pleaded. *Reed vs. Cormick. Dudley*..... 20
4. By the 6th section of the Act of 1799, the Superior Courts, as *Courts of Law*, have the power to establish lost papers. *Barney, Adm'r, vs. Doyle. Dudley*..... 201
5. Neither consent nor the act of one party can confer jurisdiction. *Com. of Pilotage vs. Lowe et al. R. M. Char.*..... 298
6. In tribunals of special and limited jurisdiction, every fact or thing essential to confer the jurisdiction, must in some manner appear on their proceedings. *Ibid.*..... 302
7. Tribunals of summary and extraordinary jurisdiction are to be reviewed with the utmost liberality as regards regularity and form. *Ibid.*
8. The question of jurisdiction must be tried in the Court where it arises.

- es. It may be raised at any stage of the proceedings, if the defendant is not in *laches*. *Stiles vs. Knapp et al. Ga. Dec. part II.*..... 36
9. A plea to the jurisdiction, is a personal right, and available only by the defendant. *Briscoe vs. Brewer et al. Ga. Dec. part II.*..... 105
10. In cases of fraud, Courts of Law and Equity have concurrent jurisdiction. The first acquiring jurisdiction, is entitled to retain it. *Trippe et al. vs. Lowe's Adm'r. 2 Kelly.*..... 305
11. A *fi. fa.* is levied on land in a different County from the residence of the plaintiff. The Superior Court of the County where the land lies, has jurisdiction in Equity over the plaintiff in a proper case made. *Merchant's Bank vs. Davis. 3 Kelly.*..... 115
12. Parties cannot, by consent, give jurisdiction to a Court where it has none by law. *Bostwick, Adm'r, vs. Perkins, &c. 4 Ga.*..... 47
13. But a party may waive a privilege which exempts him from the jurisdiction, where the Court otherwise has jurisdiction of the person and the subject-matter. *Ibid.*
14. Exceptions to the jurisdiction of the Court over the person of one defendant, is a right personal to that defendant, and cannot be taken advantage of by his co-defendant. *Rice, Receiver, &c. vs. Tarver et al. 4 Ga.*..... 571
15. There is no Statute Law of Georgia which authorizes citizens of a *foreign State* to be made parties to proceedings in our Courts without their consent, and to conclude them by a judgment *in personam*. *Dearing vs. The Bank of Charleston. 5 Ga.*..... 497
16. The Act of 5 George II. held to be of force in Georgia, in its spirit ; that Act applies to citizens of the State who abscond or depart from the State to avoid the service of process, or citizens of a foreign State, who having been in the State, depart therefrom for the same purpose. *Ibid.*
17. The property of a citizen of a foreign State, within the limits of this State, is subject to the jurisdiction of our Courts. *Ibid.*
18. The jurisdiction of the Superior Courts of Georgia is co-extensive with its sovereignty ; yet they conclude by their judgments none but parties. *Ibid.*
19. The Courts of this State have no extra-territorial jurisdiction, and cannot make the citizens of foreign States amenable to their process, or conclude them by a judgment *in personam* without their consent.

A judgment *in personam*, rendered against an inhabitant of a foreign State, although notice was served upon him by publication, under the 2d Rule in Equity, held to be a nullity as to him. *Ibid.*

20. In a suit in Chancery against a citizen of this State, who has been duly served, and also against an inhabitant of a foreign State, a decree rendered therein, held to be conclusive as between the complainant and the citizen of this State, and that it is a complete protection to such citizen; and the decree in such a suit cannot be enjoined by such foreign citizen, on the simple fact of *non-residence*. *Ibid.*
21. A construction put upon the *second rule in Equity*, authorizing service to be perfected by publication in certain cases. *Ibid.*
22. A judgment obtained in a County where defendant does not reside, by an acknowledgment of jurisdiction, is void as against subsequent judgments obtained in the manner and place prescribed by law. *The Georgia Railroad and Banking Co. vs. Harris et al.* 5 Ga..... 527
23. The Courts of Ordinary in this State, are Courts of *limited* jurisdiction, and the facts necessary to give the Court jurisdiction of the particular subject-matter, should affirmatively appear upon the face of its proceedings, when offered as evidence in any other Court. *Grier vs. McLendon.* 7 Ga..... 362
24. When it appears that the Court had jurisdiction of the particular subject-matter, the judgment will be conclusive, when offered in any other Court, and cannot be attacked collaterally. In order to set aside such a judgment, some direct proceeding must be had for that purpose, in the Court in which the judgment was rendered. *Ibid.*
25. The jurisdiction of the Courts of this State is co-extensive with its sovereignty, and that is limited only by its territory, and it therefore attaches upon all the property and persons within the limits of the State; yet, it is to be so exercised as to conclude by judgment none but those who are parties. *Adams vs. Lamar.* 8 Ga..... 83
26. The Courts of this State have no extra territorial jurisdiction, and cannot make the citizens of foreign States amenable to their processes, or conclude them by a judgment *in personam*, without their consent. *Ibid.*
27. A foreign citizen may waive his exemption and submit to the jurisdiction, and in that event he will be concluded by the judgment. *Ibid.*
28. When a foreign citizen appears, and by counsel pleads to the jurisdiction, he is not held to have waived his exemption by appearance. Ap-

pearance and pleading or answering to the merits: *Held*, to be a waiver of his exemption, and an assent to the jurisdiction. *Ibid*.

29. A files his bill against B, who is a citizen of New York, setting forth an agreement by which B stipulated to give to A one-third of certain lands, to which B held the legal title, and prays an assignment of the one-third and a conveyance by B to A. Service of the bill was perfected on B's agent in Georgia: *Held*, that upon this bill, a Court of Chancery could not decree against B, because of the want of jurisdiction over him. *Ibid*.
30. By the Act of 1820, in all cases where, by the LIIId section of the Judiciary Act of 1799, the Superior Courts have Equity powers, the party may institute his suit on the Common Law side of the Court, if he can establish his claim without resorting to the conscience of the defendant. *The Justices, &c. use of Davis vs. Hemphill*. 9 Ga..... 65
31. The jurisdiction in such cases is concurrent. *Ibid*.
32. In cases of fraud, (except fraud in obtaining a will,) Courts of Equity and Courts of Law have concurrent jurisdiction, and the plea of a *total* failure of consideration to an action upon a contract, under seal, on the ground of *fraud*, will be allowed in a Court of Law. *McKnight vs. Killett*. 9 Ga..... 532
33. The judgment of a Court of competent jurisdiction, is conclusive as to the facts which it decides, until reversed or set aside; and such judgment cannot be collaterally impeached or contradicted, by evidence which such judgment declares to have been *cancelled and annulled*. *Wiley, Parish & Co. vs. Kelsey, Halsted & Co*. 9 Ga..... 117
34. A judgment rendered by a Court without jurisdiction, is a mere nullity, and may be so held, wherever, and whenever, and in whatever way it is sought to be used as a valid judgment. *Towns, Gov. use, &c. vs. Springer et al*. 9 Ga..... 130
35. Where a suit was commenced against two defendants, residing at that time in Marion County, and before trial and judgment, the new County of Macon was created, embracing that portion of the territory of Marion on which the defendants resided, and no provision was made in the Act for the transfer of suits from the old to the new County: *Held*, that by operation of law, under the provisions of the Constitution, the new County of Macon was the proper County for the *trial* of the cause; that being the County wherein the defendants resided. *Perkins, Hopkins and White et al. vs. Patten*. 10 Ga..... 241
36. In regard to Courts of general jurisdiction, the rule is, that nothing will be intended to be out of their jurisdiction but that which *specially*

appears to be so; and when such a Court has rendered a judgment in relation to any subject-matter within its jurisdiction, the presumption is, that it had before it sufficient evidence to authorize it to award such judgment, which judgment will be conclusive until reversed or impeached for fraud. *Kelsey & Halsted vs. Wiley, Parish & Co.* 10 Ga. 371

See *Courts, passim*.

JURY.

I. GENERALLY.

II. CHALLENGES : PRACTICE, &c.

III. MISCONDUCT.

"TRIAL BY JURY," see *Constitutional Law, V.*

I. GENERALLY.

1. Jurors must be unanimous to find a verdict. *Campbell vs. Wooldridge.*
Ga. Dec. part II...... 132
2. Grand Jurors are competent talesmen in criminal cases. *Rouse vs.*
The State. 4 Ga..... 136
3. In criminal cases, it is the right and duty of the Judge to instruct and officially direct the Jury as to the law of the case, whilst they have also the right to judge of the law as well as the facts. *Holder vs. The State.* 5 Ga..... 441
4. No principle or rule of practice, tending to preserve the purity of Jurors, should, in the slightest degree, be abandoned or impaired. *Monroe vs. The State.* 5 Ga..... 85
5. A Juror will always be heard in his own vindication. *Ibid.*
6. It is not the right of the parties to poll the Jury in civil causes, but it is discretionary with the Court to allow them to be polled or not. *Smith & Shorter vs. Mitchell.* 6 Ga..... 458
7. The dispersion of the Jury, after the verdict is handed in to the Clerk, and before it is received by the Court: *Held,* to be a good reason for a refusal to permit the Jury to be polled. *Ibid.*

8. The relative powers and province of the Court and Jury in Equity causes, under the Constitution and Laws of Georgia examined. *Hargraves vs. Lewis.* 7 Ga. 110. See, also, *McGowan vs. Jones et al.* R. M. Charl 184
9. The citizens of an incorporated City, who are liable to be taxed for the payment of the verdict, are incompetent to sit as special Jurors on the trial of a cause in which the City Council are defendants. *The Mayor, &c. vs. Goetchius.* 7 Ga. 189
10. It is competent for a Juror, whose verdict is impeached on the ground of a previously expressed opinion against one of the parties, to support his verdict by an affidavit, denying any alleged declarations, or explaining them; and if thus denied or satisfactorily explained, a new trial will not be granted. *Ibid.*
11. The Act of 1805 changes the Act of 1799, only as to the mode of drawing Grand Jurors. Under both Acts, those remaining on the list, as made out from the tax books by the Clerk, constitute the Petit Jury. So that the Act of 1799 is in fact superseded both as to Grand and Petit Jurors, by the Act of 1805. *Malone, alias Hall, vs. The State.* 8 Ga. 408
12. When a Jury has been regularly drawn and summoned for the trial of a slave charged with a capital offence, according to the Statutes of this State, such slave is entitled to be tried by such Jury, and the Justices of the Inferior Court have not the right, capriciously to discharge such Jury, without some good and legal cause, and summon any other Jury for the trial of such slave. *Judge (a slave) vs. The State.* 8 Ga. 173
13. The affidavit of a Juror will not be received, to impeach his own verdict. *Bishop vs. The State.* 9 Ga. 121
14. Where it appeared from the minutes of the Court, on a particular day, that one of the Grand Jurors had been excused for the balance of the term, and also that a true bill had been returned on the same day by the Grand Jury against a defendant, in which the name of the excused Juror was inserted: *Held*, that the minutes of the Court did not afford even presumptive evidence that the bill of indictment was found by the Grand Jury, after the excused Juror had left the body of his fellow Jurors, and was not sufficient to quash the bill of indictment. *Thompson vs. The State.* 9 Ga. 210
15. Where it appeared on the face of the record, that there were a competent number of Jurors to render a verdict, such verdict may be signed by one as foreman, in behalf of himself and his fellows. *Davidson vs. Carter & Ritch.* 9 Ga. 501

16. Upon the trial of a criminal cause, it is error in the Court, after a Juror, with eleven others, has been chosen and sworn, to discharge him upon the ground of having absented himself from the Court-house without leave, without giving the parties an opportunity of removing his *prima facie* disqualification occasioned by such absence. *Stanley vs. The State.* 10 Ga..... 82
17. In what sense are the Jury judges of the law, in a criminal cause? *Quere. Berry vs. The State.* 10 Ga..... 511

II. CHALLENGES: PRACTICE, &c.

1. Where two are jointly indicted, if they wish the liberty of challenging, peremptorily, twenty Jurors each, they should claim that liberty when set to the bar to be tried. If they challenge jointly, it will be no ground for arrest of judgment. *State vs. Manquo & Segar. T. U. P. Charl.*..... 22
2. The practice in England, upon the construction of the Act of 33 *Edward I.* of *passing* Jurymen in criminal cases, until the whole panel is exhausted, and a Jury not made, before the Crown can be called upon to show cause, is not authorized in Georgia since the adoption of the Penal Code. *Sealy vs. The State.* 1 *Kelly*, 215. See, also, *Reynolds vs. The State.* 1 *Kelly*..... 228
3. As the Jurors are called, the State must put them upon the prisoner, or otherwise challenge them peremptorily or for cause. *Reynolds vs. The State.* 1 *Kelly*..... 228
4. The Act of 1843, prescribing questions to be propounded to Jurors, to test their competency for the trial of criminal cases, is not applicable to any cases which arose previous to its passage. *Ibid.*
5. A Juror who states upon oath, in answer to said statutory questions, that he has formed and expressed an opinion with regard to the guilt or innocence of the prisoner from hearsay, is not an *impartial* Juror, and is therefore incompetent. *Ibid.*
6. The Common Law right of a prisoner to challenge a Juror *propter affectum*, is not taken away by the Act of 1843, prescribing the oath to be administered to Jurors in criminal cases; that Act only prescribes the manner in which the right shall be exercised. *Robinson vs. The State.* 1 *Kelly*..... 571
7. If the prisoner desires the benefit of his right to challenge a Juror, *propter affectum*, he must, under the provisions of the Act of 1843,

ask for the appointment of triors for that purpose, in the manner pointed out by the Common Law. *Ibid.*

8. It is a good cause of challenge to the array in a criminal cause, that the *Tales Jurors* presented on the panel and put upon the prisoner, were drawn from the Grand Jury box by the presiding Judge, and the list of the names so drawn, furnished the Sheriff by the Court, with instructions to summon them as *Tales Jurors* to serve on the trial. *W. J. Boon vs. The State.* 1 *Kelly*..... 635
9. The opinion which disqualifies a Juror from sitting in a criminal cause, depends on its *nature* and *strength*, and not the source in which it originated. *Ibid.*
10. The State is entitled to the ten peremptory challenges allowed by the Penal Code of 1833. *K. P. Boon vs. The State.* 1 *Kelly*..... 619
11. After a Juror has answered in the negative the questions propounded by the Act of 1843, it is competent for the prisoner to put him upon *triors*, for the purpose of showing that he is not indifferent; and the formation and expression of a *decided* opinion, as to the guilt or innocence of the prisoner, is a disqualification, notwithstanding it be founded on rumor or hearsay; and it is not necessary to prove personal prejudice or ill-will to the accused. It will be inferred from a deliberate opinion of guilt once declared. *Ibid.*
12. A Juror is not disqualified who has *formed* without *expressing* an opinion, from rumor or hearsay. *Hudgins vs. The State.* 2 *Kelly*.... 174
13. It is a good cause of challenge to a Juror by the State, if on being sworn on his *voire dire* he declares that he has conscientious scruples against the infliction of capital punishment. *Williams vs. The State.* 3 *Kelly*..... 457
14. The proper time for challenging is between the appearance and the swearing of the Juror. *Ibid.*
15. It is irregular and improper to ask any other questions of a Juror than those authorized by the Statute, to ascertain whether he is objectionable *for favor*. *Ibid.*
16. A bias or prejudice against the crime, is not such as will constitute good ground of challenge for cause. *Ibid.*
17. The repeal of the 48th section of the XIVth division of the Penal Code of 1833, by the Act of 1843, and the change therein made, as to the mode of selecting Jurors in criminal cases, does not prevent the trial of an offence against the old law, inasmuch as the 34th sec-

- tion of the same division of the Code provides that "all crimes and offences committed, shall be prosecuted and punished under the laws in force at the time of the commission of such crime or offence, notwithstanding the repeal of such laws before such trial takes place." *Reynolds vs The State*. 3 *Kelly*..... 55
18. Grand Jurors are competent talesmen in criminal cases. *Rouse vs. The State*. 4 *Ga*..... 136
19. The owner or manager of a slave, charged with a capital offence, when acting as the counsel of his slave on the trial, can lawfully waive the number of Jurors required by the Statute to be impannelled for the trial of such slave, and consent to take the first twelve on the Jury list. *Alfred vs. The State*. 6 *Ga*..... 483
20. The citizens of an incorporated City who are liable to be taxed for the payment of the verdict, are incompetent to sit as special Jurors on the trial of a cause in which the City Council are defendants. *The Mayor, &c. vs. Goetchius*. 7 *Ga*..... 139
21. It is no objection to a Juror drawn and summoned for the trial of a slave, who appeared and answered to his name, that the summons was left at his residence and not served personally. *Judge, (a slave,) vs. The State*. 8 *Ga*..... 173
22. It is no objection to a Juror because there was a mistake as to his middle name, who appeared and answered, stating his right name. The mistake was properly corrected and the Juror impannelled. *Ibid*.
23. Where a Juror has answered negatively, both of the questions propounded by the Act of 1843, and been found competent by triors, (who were not specially sworn for that purpose,) and been accepted by the prisoner, and sworn in chief, and the Court, to cure the irregularity, causes the Juror to be put again upon the prisoner, who objected, on the ground that he had already been sworn in chief, and was thereby understood by the presiding Judge, to insist on the Juror's sitting in the case: *Held*, that nothing had transpired in relation to this Juror, to constitute a good challenge for cause; and that if a good cause and waived, the consent cures the irregularity. *Malone, alias Hall vs. The State*. 8 *Ga*..... 408
24. When a Juror is put upon triors, it is not competent for counsel to ask him any other questions than those propounded by the Act of 1843. *Bishop vs. The State*. 9 *Ga*..... 121
25. Neglect to challenge a Juror before he is sworn, is a waiver of objection to him. *Glover vs. Woolsey et al. Dudley*..... 85

III. MISCONDUCT IN THE JURY.

1. It is a contempt of Court if the Jury, after they have retired to decide upon a criminal cause, hold communications with persons other than the officers of Court. *State vs. Helvenston et al. R. M. Char.* 48
6. So, if one Juror separates himself from his associates, and mingles with the community at large. *Ibid.*
3. The Jury are not allowed to converse with a witness who testified before them, after being charged with a cause. *The State vs. Brazil. Ga. Decisions, part II.*..... 107
4. A Juror will always be heard in his own vindication. *Monroe vs. The State. 5 Ga.*..... 85
5. Where there has been any improper separation of the Jury during the trial, the presumption is, that it is hurtful to the prisoner, and the onus is on the State to show that it is not. *Ibid.*
6. The speaking of a Juror, after being charged with the case, with persons not members of the Jury, about the evidence, and expressing his opinion as to the rights of one of the parties: Held, to be a serious indiscretion, worthy of judicial censure. *Foster vs. Brooks, Adm'r. 6 Ga.*..... 287
7. Upon the trial of a criminal cause, it is error in the Court, after a Juror with eleven others, has been chosen and sworn, to discharge him upon the ground of his having absented himself from the Court-house without leave, without giving the parties an opportunity of removing his *prima facie* disqualification, occasioned by such absence. *Stanley vs. The State. 10 Ga.*..... 82
8. When a ground for new trial. See Title "New Trial," II.

JUSTICES OF THE PEACE.

1. Under the 81st section of the Judiciary Act of 1797, Justices of the Peace were entitled to be heard before the Grand Jury, before a true bill for malpractice could be found; and if necessary, the sending of the bill to the Jury will be postponed until he can procure his witnesses. *State vs. Pettibone. T. U. P. Char.*..... 300

2. Where a Justice receives the money due on papers placed in suit in his Court, before judgment: *Held*, that he is a *collecting officer*, authorized to receive the money and liable to be ruled for it in the Superior Court, as received in his official capacity. *Johnson vs. Hall*. 5 Ga.. 384
3. A certified copy of the record of commissions from the Executive Office, is the highest and best evidence of the fact, that one who appears from his acts, to have been a Justice of the Peace, in a given County, during a particular time, was not a Justice of the Peace during that time. *Fain vs. Gathright*. 5 Ga..... 6

See *Constable* ; *Courts*, V. *Execution*, II.

LACHES. See *Equity*, VII.; *Mandamus*.

LAND.

1. The doctrine of the equitable lien of vendor of land for unpaid purchase money, recognized, where no title had passed, and the intention of the parties to look to the property itself was manifest. *Marine & Fire Ins. Bank vs. Early & Brown*. R. M. Charl..... 279
2. The lien will be presumed against purchasers by act of law, as assignees of a bankrupt and creditors claiming under a conveyance from the vendee. *Ibid*. See, also, *Mims vs. Macon & West*. R. R. 3 Kelly 341
3. Vacant lands only, are subject to be granted on head-rights in this State. *Moody vs. Fleming*. 4 Ga..... 115
4. Lands in possession of a grantee, under a grant void for irregularity, and whose possession has continued for more than seven years, is not vacant. *Ibid*.
5. A growing crop of corn, after it is laid by, and before maturity, passes to the purchaser of the land. *Pitts vs. Hendricks*. 6 Ga..... 452
6. Where a Sheriff sells land under execution, and goes out of office before executing title to the purchaser, his successor in office may execute a title to such purchaser, without an order of Court. *Fretwell vs. Doe ex dem. Morrow*. 7 Ga..... 264
7. Where a Constable levies a Justice's Court *fi. fa.* on land, and delivers the same over to the Sheriff, for the purpose of sale, as provided in

the Act of 1811, such Sheriff is lawfully *seized* of the land, to sell the same and to convey title to the purchaser thereof. *Ibid.*

8. The Statute 32 *Henry VIII.* is of force in this State, and a deed made by an infant, while under age, will not be avoided by the execution of a deed after he arrives at the age of 21, when the possession of the land is held adversely to him, but the latter deed will be void under the Statute. *Harrison vs. Adcock et al.* 8 *Ga.*..... 68
9. The Act of 1823, which authorizes the Sheriff to place the purchaser of land in possession, does not justify the officer in dispossessing any other person but the defendant in execution, his heirs or tenants. *Be-thune vs. Wilkins and another.* 8 *Ga.*..... 118
10. Land cannot be levied on and sold under an order of the Magistrates, on attachments returnable to Justices' Courts; it must be by virtue of an execution issuing upon the judgment in attachment. *Rogers vs. McDill & Campbell.* 9 *Ga.*..... 506

See *Contracts, II.; Covenant; Equity, I. d.; Grants, passim; Landlord and Tenant; Lien, II.; Promissory Notes, I. 6; Ways.*

LANDLORD AND TENANT.

1. All the rights which belong to parties in "cases of claim," (at least such as regard the mode of trial,) belong to parties to distress warrants for rent, as soon as replevy is made; and among these rights, is that of appeal to a Special Jury. *Hale vs. Burton. Dudley.*..... 105
2. A distress warrant for rent, is a remedy which none but a landlord can have; and as soon as the relation of landlord and tenant ceases, the remedy ceases with it. *Ibid.*
3. A distress warrant may be levied on the tenant's property, wherever it can be found in the County, and the authority to levy is not confined to the demised premises. *Ibid.*
4. The necessary equipments of a militia soldier, the implements of trade, necessary wearing apparel, and bedding for self and family, cannot be made liable for debt by any process, particularly a distress warrant. *Hendricks vs. Lewis et al. R. M. Charl.*..... 105
5. In case of express contract to pay rent, the destruction of the premi-

- ses by fire or violence, or any casualty whatever, is not a good defence to an action to recover the rent, unless there is also an express stipulation to that effect; nor will a Court of Equity relieve against such contracts, under such circumstances. *White et al. vs. Molyneux*. 2 *Kelly*..... 126
6. A lease for a term of years being a chattel, may be made to commence *in futuro*. *Field vs. Howell*. 6 *Ga* 423
7. Where one buys land at Sheriff's sale, upon which there is a lease from the defendant in execution older than the judgment; and at the time of the sale, the lessee has not entered into possession, he buys it subject to the right of entry and user under the lease. *Ibid*.
8. A distress warrant for rent, under the Act of 1811, which is issued on the oath of an agent, is irregular and void; it can only issue on the oath of the person to whom the rent is due. *Howard and others vs. Dill & Co*. 7 *Ga* 52
9. Where two are in the joint occupancy of land, the one having no title will, in the absence of all proof, be considered as holding in subordination to him who has the title. *Whittington vs. Doe ex dem. Wright* 9 *Ga*..... 23
- LARCENY. See *Criminal Law*.

LAWS.

1. May be thus graduated with regard to their authority: 1st. The Constitution of the United States. 2d. Treaties. 3d. Laws of the United States, made in pursuance of the Constitution. 4th. Constitution of the State. 5th. The Statutes of the State. 6th. Provincial Laws in force 14th May, 1776. 7th. The Common and Statute Law of England, in force in Georgia. *Flint River Steamboat Co. vs. Foster*. 5 *Ga*..... 194
2. Where the decisions of the Ecclesiastical Courts in England come in conflict with those of the Common Law and Equity Courts, on a question of property, the latter are the highest authority, and must prevail. *Chapman vs. Gray, Ex'r*. 8 *Ga*..... 337
3. Where no time is fixed for the operation of a Statute, it takes effect from its passage, and ignorance of an Act forms no legal excuse for its violation. *Heard vs. Heard*. 8 *Ga*..... 380
- LEASE. See *Landlord and Tenant*.
- LEGACY. See *Devise and Legacy*.

LEX LOCI.

1. Each indorsement upon a promissory note is a new contract, and as to its nature, construction and interpretation, is governed by the *lex loci contractus*; as to the remedies thereon, by the *lex fori*. *Cox vs. Adams.* 2 *Kelly*..... 159
2. Although a note on its face be negotiable and payable at Charleston, still, if it be indorsed in this State, and there is no evidence to show the understanding of the parties, that the undertaking of the indorser was to be performed in Charleston, the indorsement will be deemed a *Georgia*, and not a *Carolina* contract. *Levy vs. Cohen.* 4 *Ga.*..... 1

LIBEL AND SLANDER.

1. Words which are doubtful, or even innocent in themselves, if they be proven to have a criminal signification, according to the common understanding of them, will support an action of slander. Thus, "You are a member of the Pony Club," is actionable, being equivalent to a charge of horse-stealing. *Cooper vs. Perry.* *Dudley*..... 247
2. To call a woman "a whore," in *Georgia*, is actionable. *Pledger and Wife vs. Hatchcock.* 1 *Kelly*..... 550
3. To charge a person with having *gonorrhœa*, is actionable, as it will have the effect to exclude him either wholly or partially from society; certainly from all *good society*. *Watson vs. McCarthy.* 2 *Kelly*..... 59
4. An indictment charging the defendant with publishing a certain *libel*, set out in full in the indictment, *which was written by a third person*, is sufficiently certain, without charging that the same was written by such third person. *Taylor vs. The State.* 4 *Ga.*..... 14
5. A libel "of and concerning the *character* of R. M. G.," is the same as to allege it to have been published "of and concerning R. M. G." *Ibid.*
6. The question of malice in the publication, is a question for the Jury. *Ibid.*

7. As to how far a publication may be justified in protection of legal rights, see *Opinion of Judge FLEMING. Ibid.*
8. As a matter of practice, the libel should not be read to the Jury until the defendant has cross-examined the witness proving its publication. *Ibid.*
9. The words "I believe Giddens burnt the camp-ground," are actionable, *per se. Giddens vs. Mirk. 4 Ga. 364*
10. In actions of slander, where the damages assessed are less than forty shillings, the plaintiff can have no more costs than damages. *Harden vs. Lumpkin. 5 Ga. 452*
11. In an indictment for a libel, placed in a situation where it might have been seen and read: *Held*, that it is unnecessary to aver or prove that it was seen or read. *Giles vs. The State. 6 Ga. 276*
12. If a libel import defamation on its face, of a particular person, it is unnecessary to insert inuendoes in the indictment. *Ibid.*
13. It is libellous to charge a person with being a drunkard, a cuckold, and a tory. *Ibid.*
14. A person who appears to have written a libel, which is afterwards published, will be considered as the maker of it, unless he show another to be the author of it, or prove the act to be innocent of itself. *Ibid.*
15. If a libel appears in a man's handwriting, and no other author is known, it turns the proof upon him; and if he cannot produce the composer, he is presumed by law to be the man. *Ibid.*
16. Under the Act of 1767, which declares that when in actions of slander the damages assessed shall be less than 40 shillings, the plaintiff shall recover no more costs than damages: *Held*, that the value of forty shillings, in dollars and cents, is to be determined according to the rate at which dollars were estimated in shillings and pence, at the time when the Act was passed, that is, at the rate of 4 shillings and 8 pence, and that the sum prescribed by that Act is eight dollars and 57 cents and a fraction of a cent. *Thurmond vs. Horton. 10 Ga. 500*
17. *Held*, that in actions of slander, when the verdict is for a sum less than forty shillings, it is not competent for the defendant to have judgment against the plaintiff for his costs incurred in defence of the action. *Ibid.*

LICENSE.

1. Where a person obtains a license to retail spirituous liquors for twelve months, from the Clerk of the Inferior Court, according to the provisions of the Act of 1809, and pays a valuable consideration therefor, the corporate authorities of a City Council, by an ordinance enacted *subsequent* to the date of such license, cannot within the limits of the same County, impose and collect any additional tax or impair the rights of the party, acquired under the law as it stood at the time such license was granted. *Mayor, &c. Rome vs. Lumpkin et al.* 5 Ga. 447
2. Whether the Act of 1791, requiring license for keeping a tavern or house of entertainment, requires a license to keep a tavern, without retailing spirituous liquors? *Quere. Bonner vs. Wellborn.* 7 Ga... 296
3. *Tavern or house of entertainment*, as used in the Act of 1791, held to be synonymous; and the word *tavern*, in that Act, means the *common inn* of the Common Law. *Ibid.*
4. One whose business it is to rent houses, and furnish board, lodging and entertainment, for a season, at a watering place, to the visitors who resort there, is not the keeper of a tavern or house of entertainment, in view of the Act of 1791. *Ibid.*
5. One who is the owner of medicinal springs, and uses them as a source of revenue, by furnishing houses, board, lodging and entertainment, to those who resort to them, is entitled to sue in that character, for damage done him by the erection of a nuisance, by which the public are deterred from visiting his springs, and his profits are reduced thereby. *Ibid.*
6. Where, by the charter incorporating the City of Rome, which gave authority to the Mayor and Council to pass all by-laws and ordinances that should appear to them necessary and proper for the security, welfare and interest of said City, or for preserving the peace, health, order and good government thereof; and also to authorize said Mayor and Council to license persons to retail spirituous liquors within the said City: *Held*, that it was competent for said Mayor and Council to pass an ordinance to prohibit the retail of spirituous liquors by those to whom license had been granted within the City, after the hour of ten o'clock at night; such ordinance not essentially *impairing* the right to retail under the license granted, but only *regulating* the exercise of it, for the benefit of the peace, order and good government of the City. *Morris vs. City Council of Rome.* 10 Ga..... 532

LIEN.

- I. STATUTORY LIENS: ON STEAMBOATS, MILLS, HOUSES, &c.
- II. VENDOR'S LIEN.
- III. OTHER LIENS.

LIEN OF ATTACHMENTS, see *Attachments*, V.
 LIEN OF JUDGMENTS, see *Judgments*, III.
 LIEN OF MORTGAGES, see *Mortgages*, II.
 LIEN ON DISTRIBUTION OF ESTATES, see *Administrators*, &c. V.

I. STATUTORY LIENS: STEAMBOATS, HOUSES, MILLS, &c.

1. It is not sufficient, in proceeding under the Act of 1841, giving to all persons employed on steamboats and other water-craft, on the Chatahoochee, Altamaha and Ocmulgee rivers, a lien on such steamboat or water-craft, for wages, &c. for the plaintiff or affiant to swear to the amount due for services rendered on board such boat, without further showing the case to be within the provisions of said Act, either in the pleadings, in the form of a petition, or in the affidavit, by way of recital. The Act being in derogation of the Common Law, must be strictly construed. *Robinson vs. Steamer Lotus*. 1 *Kelly*.... 317
2. In proceedings under this Act, a petition setting forth all the necessary facts, verified by the affidavit of the party, would be a convenient and correct form of pleading. *Ibid*.
3. Where a Statute creates a specific lien in favor of masons and carpenters, on buildings erected by them, and also gives them a *specific remedy* for the enforcement of such lien, a Court of Equity has no jurisdiction to enforce it, unless there be some impediment or difficulty charged to exist, which would render the remedy given by the Statute unavailable. *Coleman vs. Freeman and another*. 3 *Kelly*..... 139
4. Whenever a Statute gives a summary remedy for services rendered, the taking of a promissory note does not waive the Statutory lien. *Butts vs. Cuthbertson et al*. 6 *Ga*..... 166
5. In suing out proceedings under the Act of 1841, giving liens to boat hands, captains, &c. it is not necessary for the petitioner to aver that the boat was in the act of traversing the river when the services were rendered. It will be sufficient to state generally, that she was navigating the river. *Butts and others vs. Cuthbertson*. 6 *Ga*..... 159
6. He should aver that his claim is prosecuted within twelve months from the time it fell due. *Ibid*.

7. The affidavit should aver a demand upon the owners of the boat or their agent, personally ; should name them, and aver refusal to pay. *Ibid.*
8. The judgment should be entered up against the owners, as well as the boat herself. *Ibid.*
9. It is necessary that the affidavit state that the boat had arrived at the landing, port, or place of destination, to which she had been freighted. *Ibid.*
10. It is not competent to amend after judgment, upon such proceedings, by substituting an entire new petition and affidavit. *Ibid.*
11. Under the Act of 1841, giving a lien on steamboats and other watercraft, navigating certain rivers : *Held*, that an affidavit, stating the names of the owners of the boat, and that demand was made of "said owners," is sufficient. *Adkins et al. vs. Baker.* 7 Ga..... 56
12. If it appears from the proceedings, that the indebtedness accrued within twelve months previous to the affidavit, it is unnecessary to be alleged specifically in the affidavit, or to appear on the face of the bill of particulars. *Ibid.*

II. VENDOR'S LIEN.

1. On the sale of landed estate, the purchase money becomes a debt on the personal estate, and the equitable lien ought to be extended to only so much of the purchased estate as the personal estate is insufficient to pay. The purchase money is not an original charge upon the landed estate, but only an equity to resort to it, in case the personal estate should prove deficient. *Harden et al. vs. Martin, Adm'x. Dudley*..... 120
2. But notwithstanding the admission of these principles, there is no authority for requiring the vendor first to obtain judgment at Law, and a return on his execution, as preliminary to his application to a Court of Equity, to obtain an account of the personal estate, and a decree of payment, if it may be so ; otherwise, that the lien be declared and the land sold. *Ibid.*
3. The doctrine of the equitable lien of vendor of land for unpaid purchase money recognized, where no title had passed, and the intention of the parties to look to the property itself was manifest. *Marine & Fire Ins. Bank vs. Early & Brown.* R. M. Charl..... 279
4. And where no title has passed, the lien will be preserved against purchasers by act of law (as assignees of a bankrupt,) and creditors claiming under a conveyance from vendee. *Ibid.*

5. The lien of the vendor of real estate attaches for the purchase money, against the vendee and all persons claiming as *volunteers* or *with notice*, under him. *Mims vs. Macon & Western R. R.* 3 *Kelly*..... 341
6. The vendor's lien applies to lands, the title to which has been transferred by operation of law, under our railroad and other corporation charters, as well as to voluntary sales by the party himself. *Ibid.*
7. There is no fixed rule as to what amounts to a waiver; each case must be determined by its own circumstances. *Ibid.*
8. Even taking security for the purchase-money, is not conclusive evidence that the lien is waived. *Ibid.*
9. The vendor's lien is not waived by the acceptance of the certificate of deposit of the cashier of the corporation, for the valuation of his land as assessed by the commissioners, provided the money is not paid when called for, owing to the insolvency of the company. *Ibid.*
10. A decree in Equity for the sale of the land, is the proper remedy to enforce the lien. *Ibid.*
11. A sells land to B, and gets judgment on the notes given for the purchase-money, and levies on the land in the possession of C, who interposes a claim: *Held*, that upon the trial of this claim, it is not competent for A to set up his lien as vendor, but that he is forced to go into Equity to assert it. *Colquitt vs. Thomas et al.* 3 *Ga.*..... 258
12. The lien of the vendor for the purchase money, will not be enforced in favor of the assignee of the notes given therefor. *Wellborn and another vs. Williams.* 9 *Ga.*..... 86
13. The purchaser at Sheriff's sale, under the vendor or vendee of land, like a purchaser from either by voluntary conveyance, succeeds but to the interest which the debtor had power to encumber or part with, the one being entitled to call for the purchase-money, as the representative of the vendor, and the other being entitled to call for a conveyance, as the representative of the vendee. *Wilkerson et al. vs. Burr.* 10 *Ga.*..... 117
14. The judgment creditors of the vendee of land, (who has paid part of the purchase-money and has possession of the land, but has received no deed,) are entitled to the proceeds of the sale of his title, in preference to the vendor. *Ibid.*

III. OTHER LIENS.

1. A factor's lien for a balance accrued in the lifetime of his principal, does not attach to property coming into the factor's possession, after the principal's death, by order of his representative. *Wylly vs. King. Ga. Dec. part II.*..... 7
2. A purchaser, at Sheriff's sale, of stock or shares of a corporation, with notice of the lien of the company upon such stock, under a by-law of the corporation, for the indebtedness of such corporator to the company, (the lien created by such indebtedness under the by-law being prior, in point of time, to the lien acquired under the judgment,) purchased only such title as was in the corporator and no other; and therefore, was not entitled to a transfer of the stock so purchased, under the Act of 1822, without first discharging the lien created by the corporator's indebtedness under the by-law. *Tuttle vs. Walton. 1 Kelly*..... 51
3. A by-law which asserts such a lien, is, as between the corporators themselves, valid and binding. *Ibid.*
4. It is not repugnant to the charter, nor the laws of the land, nor against public policy, nor in restraint of trade. Per WARNER, J. *Ibid.*.... 48
5. The purchaser buying *with notice*, takes it subject to the lien. Per LUMPKIN, J. *Ibid.*..... 54
6. The by-law is invalid at Common Law, as against creditors, and is repugnant to the whole drift and policy of Georgia legislation. Per NESBIT, J. dissenting. *Ibid.*..... 64
7. A certificate setting forth that the holder had on deposit in the Monroe R. R. & B'k'g Co. \$300 of its notes, which should be paid to his order thereon, with 8 per cent. interest *per annum*, is not of equal dignity or priority, under the charter, with the bills of the bank, in the distribution of money raised by the sale of the road. *Bullard vs. The Central Bank. 1 Kelly*..... 462
8. The 11th section of the charter of the Monroe R. R. & B'k'g Co. gives to bill-holders a paramount lien for the payment of their bills, upon that part of the road only which was built by the company. *Collins vs. The Central Bank. 1 Kelly*..... 435
9. Such portion of the road as was built by the contractors under a mortgage thereon, to secure them for the work done, and materials and equipments furnished, is liable to them; and their lien is paramount to that of bills or notes. *Ibid.*

10. The judgment of the Supreme Court, in *Collins vs. The Central B'k*, (1 *Kelly*, 435,) did not reverse, *in toto*, the decree of the Circuit Court, settling the relative dignity of the claims upon the fund arising from the sale of the effects of the company. *Woodward vs. The Central Bank et al.* 4 *Ga.*..... 323
11. The statutory lien of bill-holders, under the charter, attaches equally upon *all* the property and effects of that company. *Ibid.*
12. A judgment creditor does not acquire a specific lien upon the equitable estate of his debtor, by the return of an execution unsatisfied, but by the commencement of a suit in Equity, after the execution has been so returned. *Blake vs. Bigelow et al.* 5 *Ga.*..... 427
13. Possession of the property, actual or constructive, is necessary to create a factor's lien. *Kollock et al. vs. Jackson.* 5 *Ga.*..... 153
14. The lien of a judgment binds all property from its date, and has precedence over and is paramount to a *factor's* lien, upon property in his possession, and all other junior liens. *Ibid.*
15. The lien of a judgment does not vest the legal title in the plaintiff, of the property of the defendant, but after levy and sale, the title of the purchaser relates back to the date of the judgment. *Ibid.*
16. One creditor cannot attack the lien of another, until it comes in conflict with his own. *Litchton and Barker vs. McDougald et al.* 5 *Ga.*.. 176
17. In a contest between attachments and ordinary judgments, the lien is fixed by the *judgment*, and not the *levy*. *Ibid.*
18. Taxes due the State, are a general lien upon all the property of the debtor, attaching on the 1st of January of each year. *Lessee of Gledney vs. Deavors.* 8 *Ga.*..... 479

LIMITATION OF ACTIONS.

- I. GENERALLY: AND HEREIN OF ADVERSE POSSESSION.
- II. ACTIONS RELATIVE TO REALTY.
- III. IN EQUITY: AND HEREIN OF TRUSTS AND TRUSTEES, AND LAPSE OF TIME.
- IV. EXCEPTIONS TO THE STATUTE: AND HEREIN OF SUITS BY AND AGAINST ADMINISTRATORS, &c.
- V. NEW PROMISE OR ACKNOWLEDGMENT.
- VI. PLEADING AND EVIDENCE.

LIMITATION OF INDICTMENTS, see *Criminal Law*.

LIMITATION ON JUDGMENTS AND FI. FAS., see *Judgments*, VI.

I. GENERALLY: AND HEREIN OF ADVERSE POSSESSION, &c

1. A Statute of Limitations, to be constitutional and operative, must give an allowance of time *in futuro*, to commence the action. *For-syth vs. Marbury*. *R. M. Charl*..... 324
2. Re-commencing an action within six months after a non-suit, will not oust the Statute. *Mahow vs. The Justices, &c.* *Ga. Dec. part II*..... 201
3. The Act of June, 1806, providing that where any action shall be instituted within time, and the plaintiff be non-suited or shall discontinue the same after the time of limitation is expired, he shall be permitted to renew his action within six months thereafter, once only, and not after, was repealed by the Act of December of the same year. *Harrison et al. vs. Walker*. *1 Kelly*..... 35
4. Where an administratrix, in her individual capacity, sold a negro belonging to the estate of an intestate, and delivered possession thereof to the purchaser: *Held*, that the possession of the purchaser was *adverse* to the title of the legal representative of the intestate's estate, and that the Statute of Limitations would protect the purchaser. *Paschal, Adm'r, vs. Davis*. *3 Kelly*..... 262
5. Naked possession is not, *per se*, a bar under the Statute of Limitations, when the beginning of the possession is permissive. *Spalding vs. Grigg*. *4 Ga*..... 75
6. Possession, by agreement with the owner, entered into at the time the title is executed, is not adverse possession; but it may become so, by a claim of title by the tenant, brought home to the knowledge of the owner. *Ibid*.

7. Declarations by the tenant, that he is holding in his own right, when the commencement of the possession is permissive, and not brought home to the knowledge of the owner, does not constitute adverse possession. *Ibid.*
8. As to how far *fraud* is a good replication to the Statute, see *Conyers vs. Kenan.* 4 Ga..... 308
9. Where A promised to pay B so much money, "as soon as he can collect it out of C by law," the Statute of Limitations does not commence running against B, until after the lapse of a reasonable length of time, for the purpose of collecting the money. *Woolbright vs. Sneed.* 5 Ga. 167
10. The second section of the Act of 1805, limiting suits on foreign judgments to be brought within five years, is still in force. *Br. Bank of Alabama vs. Kirkpatrick.* 5 Ga..... 34
11. When the Statute once begins to run, as a general rule, it is not stopped by the removal of the defendant out of the State. *Wynn vs. Lee, Trustee.* 5 Ga..... 217
12. There is no saving in favor of *non-resident* plaintiffs, under the Statutes of Georgia. *Ibid.*
13. A title to personal property, acquired under the Limitation Acts of Georgia, will sustain an action for the recovery of property. *Ibid.*
14. Where A holds possession of property in another State, until, under the Laws of Limitations of that State, he acquires title, and B purchases the property of him, and brings it to this State; in an action against B, he may plead the Limitation Acts of the foreign State, and his title under it, in bar of the action. *Ibid.*
15. In such a case, an exemplification of the Acts of such foreign State, may be read in evidence, under the general issue. *Ibid.*
16. The Statute of Limitations of this State, not only bars the *right of action*, but the *right of entry* also. *Watkins vs. Woolfolk.* 5 Ga.... 261
17. The Statute of Limitations is a wise and beneficial law, and should be made by the Courts, what it was intended to be, a Statute of repose. *Dickinson vs. McCamey.* 5 Ga... 486
18. Where a father *loans* a negro to his son, and delivers possession thereof, and the son sets up an *absolute* claim to the slave, and offers to sell him as his own property, of which the father had *notice*, the possession of the son becomes adverse, and the Statute of Limitations begins to run. *Echols and Wife vs. Barrett.* 6 Ga..... 443

19. It is the province of the Court to determine what is in law, such a promise as will take a case out of the Statute of Limitations; but it is for the Jury to find what promise is in fact made. *Love vs. Hackett, Adm'r, et al.* 6 Ga..... 486
20. A, a joint maker and surety on a note, promised the holder, that if he would not sue on it until a bill to marshal the assets of the principal, who was dead, was determined, and the amount allowed upon the note by the decree was paid, he would pay the balance then due on the note: *Held*, that upon the fulfilling of the conditions, the promise became an absolute promise to pay, and would be a sufficient reply to a plea by A, on a suit against him on the note, of the Statute of Limitations. *Held*, farther—that it was incumbent on the plaintiff to show that the conditions were fulfilled, but that it was not necessary for him to prove that they were fulfilled *before* the institution of the suit; it being sufficient to show they were fulfilled before the trial. *Ibid.*
21. The right to recover back money, paid on a usurious contract, accrues from the actual payment, and not from the agreement to pay. *Rushing vs. Rhodes.* 6 Ga..... 228
22. It is competent for the Legislature of a State to pass Statutes of Limitation prescribing the time, (provided it be not so unreasonable as to amount to a deprivation of the right,) within which judgments and all other contracts shall be enforced—there being a difference between the *obligation* of a contract, which, under the Constitution of the United States, cannot be impaired, and the remedy to enforce it, which, generally, may be left to the sound discretion of the Legislature. *Griffin vs. McKenzie.* 7 Ga..... 163
23. In a Court of Law, the general rule is, that when the Statute begins to run, it continues to run, unless its progress is arrested by some positive legislative enactment. *Pendergrast et al vs. Foley, Adm'r.* 8 Ga. 1
24. In Courts of Equity, *fraud* has been held to be an *exception* to the operation of the Statute, until the *discovery* of the fraud. *Ibid.*
25. A bill filed for the recovery of damages for the breach of a bond for titles, is a demand founded on a sealed instrument; and such a claim is not barred until twenty years after the accrual of the right of action thereon. *Caldwell vs. Montgomery and Wife.* 8 Ga..... 106
26. When a creditor takes a mortgage to secure the payment of a promissory note, and the remedy on the latter is barred by the Statute of Limitations, his remedy on the mortgage is not necessarily barred, the debt being unpaid, but he may avail himself of his statutory remedy on the mortgage. *Elkins vs. Edwards.* 8 Ga..... 325

27. *Seemle*, that when an action is founded on a Statute, the law deems it, for this purpose, a *specialty*; and consequently, a plea of the Statute, as applicable to the instrument sued on, cannot be supported. *Lane vs. Morris*. 8 Ga..... 468
28. In an action of trover by several plaintiffs of different ages—and the Statute of Limitations pleaded—it is not error in the Court to charge the Jury that they might find a verdict in favor of those not barred, and against those who are; and the verdict should specify which of the plaintiffs the Jury find for, and which against; otherwise, the verdict would be imperfect in not finding all the issues submitted. *Settle vs. Allison et al.* 8 Ga..... 201
29. Where a suit was instituted on a promissory note, and defendant pleaded a *total* failure of consideration, and alleged a *parol* warranty of the property for which the note was given, as a part of his defence: *Held*, that the plaintiff could not avoid this defence, by insisting on the Statute of Limitations, although more than four years had elapsed from the time of such parol warranty. *Morrow vs. Hanson*. 9 Ga... 398
30. Where a Sheriff has received money on a *fi. fa.* the Statute begins to run in his favor from the time it was received. *Thompson vs. The Central Bank*. 9 Ga..... 413
31. The question of adverse possession is not for the decision of the Court, but exclusively for the Jury. *Beverly and another vs. Burke*. 9 Ga..... 440
32. Where a family of slaves are held by a common title, adverse possession to one, is good as to all. *Carter and Wife vs. Buchanan*. 9 Ga. 539
33. The only bar to a suit by a minor against his guardian on his bond, is the time which the Statute prescribes for sealed instruments. *Ragland vs. The Justices, &c.* 10 Ga..... 65
34. Where the plaintiff's cause of action is founded on a Statute of this State, the Statute will be considered in the nature of a *specialty*, and not barred until twenty years. *Lane vs. Morris*. 10 Ga..... 162
35. Twenty years' possession of the mortgaged property, by the mortgagee, under the mortgage, will, *prima facie*, bar the mortgagor's right to redeem, and this is true, whether the mortgage is on real estate or personal property. *Morgan, Adm'r, vs. Morgan, Ex'x.* 10 Ga..... 297
36. But no length of time will bar the mortgagor's right to redeem, so long as the mortgagee recognizes the conveyance as a subsisting mortgage. Any acts or circumstances which show a recognition of the mortgage within twenty years, will prevent the bar, and the time will

begin to run only from the latest recognition within that period. It lies upon the mortgagor to show such recognition. *Ibid.*

37. The mortgagee in possession, holds the property in the character of trustee for the mortgagor, and may disavow the trust and disclaim the mortgage; and in that event, the time of limitation provided by the Statute for the recovery of the property at Law, will begin to run in his favor from the disavowal; and if he then holds the possession for the statutory term, the mortgagor's right to redeem is barred. *Ibid.*

38. A judgment is presumed to be paid after twenty years. This presumption may be rebutted. *Burt vs. Casey.* 10 Ga..... 178

II. ACTIONS RELATIVE TO REALTY.

1. The Statute of Limitations of 1767, is no bar to an application for the assignment of dower. *Wakeman and Wife vs. Roach.* Dudley 123
2. Adverse possession for seven years, creates a good title under the Statute. *Moody vs. Fleming.* 4 Ga..... 115
3. Possession under color of title, is adverse. *Ibid.* See, also, *Conyers vs. Kenan.* 4 Ga 308
4. A grant from the State, though void, is color of title. *Ibid.*
5. What is color of title? *Ibid.*..... 308
6. Whenever the extent of the occupant's possession can be clearly ascertained, *in any way*, it would seem that he should be entitled to the protection of the Statute within those limits. *Ibid.*
7. A bond for titles is good color of title against strangers, although the purchase money is not paid. *Fain vs. Gathright.* 5 Ga..... 6
8. Seven years' adverse, uninterrupted and continuous possession, confers a complete title to lands in this State. *Lessee of Johnson vs. Lancaster.* 5 Ga..... 39
9. The Statute does not run in favor of a tenant in possession of land, while the title thereto is in the State. *Smead and Savage vs. Lessee of Williams.* 6 Ga..... 158
10. Under the Statute of 1767, the plaintiff in ejectment has seven years to institute his action for the recovery of the possession of land, from the time his title or cause of action accrued: *Held*, that the cause of action does not accrue until the land is granted him by the State. *Ibid.*

11. A Court of Equity will enjoin an administrator from recovering a tract of land, where the intestate has been dead 26 years, and the heirs were of age at the time of the death and for more than seven years next preceding the commencement of the action, and where there are no debts against the estate, and the defendant has been in adverse possession for more than twenty years before administration granted. *Jonekin vs. Holland, Adm'r.* 7 Ga..... 589
12. The Act of 1839, which limits the widow's application for dower, to seven years from the death of her husband, operates prospectively, and does not apply to cases where the husband died before the passage of that Act. *Tooke et al. vs. Mason and Wife.* 7 Ga..... 20
13. The right of dower is not within the Act of Limitations of 1767. *Ibid.* See also, *Chapman vs. Schroder.* 10 Ga..... 321
14. To constitute an *equitable* bar to the widow's claim of dower, by her acts and acquiescence in the provisions of the will for her benefit, so as to raise the presumption that she had made her election to accept such testamentary provisions in lieu of dower, it must be shown that she was cognizant of her rights, and acted understandingly. *Ibid.*
15. Seven years' exclusive and continued possession and enjoyment of a ferry right is, in this State, presumption of a grant. *Williams vs. Turner and another.* 7 Ga. 296. See also, *Harrisons vs. Young.* 9 Ga. 359
16. Seven years' peaceable possession of land, since 1822, by a *bona fide* purchaser, without actual notice of a judgment against the vendor, will protect the purchaser against the lien of a judgment obtained prior to the Act of 1822. *Griffin vs. McKenzie and another.* 7 Ga... 163
17. The Statute of Limitations does not run against the true owner of lands, who has a perfect title in favor of a party in the actual possession thereof, who disclaims having any title or claim to the land, inasmuch as the law presumes that such possession is held in subordination to the title of the true owner, and is not adverse to his title. *English vs. Doe ex dem. Register.* 7 Ga..... 387
18. The Statute of Limitations will run against an insane person from the time of his restoration to sanity, with knowledge of the existence of the deed. *Dicken vs. Johnson.* 7 Ga..... 484
19. A defendant is not protected by the Statute of Limitations, unless he establishes possession in himself, or those under whom he claims, for the statutory term. *Ibid.*
20. Color of title defined. *Beverly and another vs. Burke.* 9 Ga..... 440

21. Though the title of an adverse possession be ever so defective, yet the true owner must sue within seven years, or he is barred his entry. *Ibid.*
22. The question of adverse possession is not for the decision of the Court, but exclusively for the Jury. *Ibid.*
23. How far and to what extent the occupant will be protected in his possessory title? *Ibid.*
24. More than seven years' notorious, peaceable and adverse use and occupation of gold mines, where the party has gone into possession of the land, under deed, will give a statutory right, notwithstanding the vendor has reserved the exclusive privilege of working said mines. *House et al. vs. Palmer.* 9 Ga. 497
25. Where a family of slaves is held by a common title, adverse possession as to one, is good as to all. *Carter and Wife vs. Buchanan.* 9 Ga. 539
26. Possession of land, under color of *paper* title, is not indispensably necessary to protect the tenant, under the Statute of Limitations. *Doe ex dem. Pendergrast vs. Prather.* 10 Ga. 218
27. A defendant in ejectment may protect his possession under the Statute of Limitations, under a parol contract, especially if the purchase money has been paid and possession given. *Ibid.*

III. IN EQUITY: AND HEREIN OF TRUSTS AND TRUSTEES, AS AFFECTED BY THE STATUTE, AND OF LAPSE OF TIME.

1. Where one partner dies, the Statute of Limitations does not commence running in Equity until there is an administrator. *Gardner, Adm'r of Spann, vs. Cumming.* Ga. Dec. part I. 1
2. The Statute does not begin to run in favor of a trustee until his possession becomes adverse by a refusal to deliver the trust property, or an appropriation of it by him. *Martin and Frost vs. Greer.* Ga. Dec. part I. 109
3. Courts of Equity usually act in obedience and in analogy to the Statute of Limitations, in cases where it would not be unjust and inequitable to do so. *McDonald vs. Sims et al.* 3 Kelly. 395
4. Lapse of time is no bar to cases of express trust created by deed or will, where proceedings are instituted within a reasonable time, and there is no doubt either as to the origin or the existence of the trust. *Ibid.*

5. What is the limitation to bills of review in Georgia? *Quere. Har-
graves vs. Lewis. 7 Ga.*..... 110
6. Trusts intended by the Courts of Equity, not to be reached or affect-
ed by the Statute of Limitations, are those technical, continuing trusts,
which are not at all cognizable at Law, but fall within the proper, pec-
uliar and exclusive jurisdiction of Courts of Chancery. *Thomas vs.
Brinsfield. 7 Ga.*..... 154
7. A bill filed by distributees, to recover against the representatives of
a deceased administrator, upon the accounts returned and passed by
the Court of Ordinary, *nineteen* years after the accounts were rendered,
without any allegation of fraud, or setting forth any excuse or reason
for the delay: *Held, to be barred by lapse of time. Akins et al. vs.
Hill et al. 7 Ga.*..... 573
8. In Courts of Equity, *fraud* has been held to be an exception to the
operation of the Statute, until a *discovery* of the fraud. *Pendergrast
et al. vs. Foley, Adm'r. 8 Ga.*..... 1
9. If a party is to be constituted a trustee by the decree of a Court of
Equity, on the ground of *fraud*, his possession is *adverse* from the time
the circumstances of the fraud were discovered. *Harrison vs. Adcock
et al. 8 Ga.*..... 68
10. The Statute of Limitations does not begin to run against express
trusts created by the act of the parties or the appointment of law, so
long as the trust continues, and is acknowledged to be a *continuing,
subsisting* trust, for the reason that the possession of the trustee is the
possession of the *cestui que trust*; but when the trust is denied by the
trustee, and he claims to hold the trust funds or trust property as his
own, adversely to his *cestui que trust*, the latter having knowl-
edge of that fact, the Statute will begin to run in favor of such
express trustee from the time of such adverse claim or possession.
Keaton vs. Greenwood. 8 Ga...... 97
11. The Statute of Limitations will begin to run in cases of *implied trusts*,
created by decree of a Court of Equity in favor of the trustee, from the
time of his possession, as it would do in a Court of Law; for the rea-
son, that his possession never was the possession of the alleged *cestui
que trust*; the relation of *trustee* and *cestui que trust* never, in fact, ex-
ists, until the decree of the Court establishing that relation. *Ibid.*
12. A bill filed for the recovery of damages for the breach of a bond
for titles, is a demand founded on a sealed instrument, and such a
claim is not barred until twenty years after the accrual of the right of
action thereon. *Caldwell vs. Montgomery and Wife. 8 Ga.*..... 106

13. The right of a creditor to force a stockholder to pay in his unpaid subscription for stock in an insolvent bank, is a case of purely technical and direct trust, to which the Statute of Limitations does not apply. *Hightower vs. Thornton*. 8 Ga..... 486
14. In Courts of Equity, the Statute of Limitations does not commence to run in cases of fraud, until the discovery of the fraud. *Stocks et al. vs. Leonard et al.* 8 Ga..... 511
15. The Statute of Limitations is a good defence, by way of demurrer, if the facts appear upon the face of the bill; if not, it must be made available by plea. In Equity, if the complainant be within any exception to the Statute, it is incumbent on him to state it in his bill. *Worthy et al. vs. Johnson et al.* 8 Ga..... 236
16. Although the Statute of Limitations applies to constructive trusts, yet it is not available where the legal remedy has not been barred. The Statute does not begin to run in favor of a trust estate, against a debt contracted by an agent thereof, until a return of *nulla bona* against the agent, or his insolvency be legally ascertained. The practice of exhausting the legal remedy against such agent before proceeding in Equity against the trust estate, is in furtherance of justice. *Wylly et al. vs. Collins & Co.* 9 Ga..... 223
17. Where an action is brought by a *cestui que trust*, to enforce against the trustee the provisions of the trust deed, and he does not deny the complainant's interest in the trust estate, but defends upon other grounds, the limitation to the suit is the term applicable to sealed instruments. *Flynt and Wife vs. Hatchett, Trustee, &c.* 9 Ga..... 328
18. The Statute does not run against a married woman to whom property had been left in *trust* after her coverture, she being within the exception in the Statute in favor of *femes covert*, in a case where she and her husband are suing in Equity for the recovery of the property. *Ibid.*
19. The mortgagee in possession, holds the property in the character of trustee for the mortgagor, and may disavow the trust and disclaim the mortgage; and in that event, the time of limitation provided by the Statute for the recovery of the property at Law, will begin to run in his favor from the disavowal; and if he then holds the possession for the statutory term, the mortgagor's right to redeem is barred. *Morgan, Adm'r, vs. Morgan.* 10 Ga..... 297
20. When the mortgagee relies upon the Statute after a disavowal of the trust, it lies upon him to show the disavowal, and to bring home to the mortgagor knowledge of the fact, and this knowledge cannot be shown constructively. *Ibid.*

IV. EXCEPTIONS TO THE STATUTE: AND HEREIN OF SUITS
BY AND AGAINST ADMINISTRATORS, &c.

1. Where the maker of a note was banished by Act of Confiscation, and subsequently released by Act of Assembly, the Statute of Limitation did not run in his favor during the time he was proscribed. *Johnson vs. White, Adm'r, &c. T. U. P. Char.*..... 141
2. The exception in favor of merchants' accounts, in the 5th section of the Act of 1767, is not repealed by the Act of 1809. *Fellows vs. Guimarin et al. Dudley.*..... 101
3. An administrator cannot compute the year of his exemption from suit in support of the plea of the Statute of Limitations. *Jordan vs. Administrator of Jordan. Dudley.*..... 182
4. The general rule, that when the Statute commences to run, it will continue to run, must yield to the statutory inhibition against the plaintiff's right to sue. *Ibid.*
5. When, during the existence of a partnership, one of the partners dies, the Statute of Limitations does not commence to run in favor of the surviving partner until there is an administration on the estate of the deceased partner. *Administrator of Spann vs. Ex'rs of Fox. Ga. Decisions, part I.*..... 1
6. Against the right of action to recover the property of an intestate, the Statute of Limitations will not commence to run until administration of his estate has been granted. *Lessee of Conyers, Adm'r, vs. Kenan. 1 Kelly, 379. See also, Lessee of Cofer, Adm'r, vs. Flannegan. 1 Kelly.*..... 536
7. The Statute of Limitations does not run against the State. *Brinsfield vs. Carter. 2 Kelly, 150. See also, Conyers vs. Kenan. 4 Ga.* 308
8. The Statute does not run against the plaintiff, in this State, during the twelve months he is inhibited from suing the defendant's executor or administrator. *Tarver vs. Cowart. 5 Ga.*..... 66
9. There is no saving in favor of *non-resident* plaintiffs, under the Statutes of Georgia. *Wynn vs. Lee, Trustee. 5 Ga.*..... 217
10. The Statute of Limitations does not run in favor of a tenant in possession of land, while the title thereto is in the State. *Smead and Savage vs. Doe ex dem. Williams, Adm'r. 6 Ga.*..... 158

11. The Statute of Limitations does not commence to run against the estate of a deceased testator, until *probate* of the will and *qualification* of the legal representative of such estate. *Garland vs. Millen, Ex'r.* 6 Ga..... 310
12. The Statute of Limitations will run against an insane person, from the time of his restoration to sanity, with knowledge of the existence of the deed. *Dicken vs. Johnson.* 7 Ga..... 484
13. The Statute of Limitations does not run against minors. *Jordan vs. Thornton et al.* 7 Ga..... 517
14. If one or more tenants in common, in an action of trover, be barred by the Statute of Limitations, and one or more be within an exception in the Statute, their exception will not relieve against the operation of the Statute, as to the one barred; and those within the exception will recover their several interests, notwithstanding the bar of the other. *Ibid.*
15. If property belonging to an infant, is converted during his minority, the Statute will commence to run against him upon his arrival at full age, in favor of the *tort feasor*, and those who claim under him, notwithstanding the property be removed without the jurisdiction of the State, unless prevented by some one exception in the Statute, as the *non-residence* of the *tort feasor*. *Ibid.*
16. In a Court of Law, the general rule is, that when the Statute begins to run, it continues to run, unless its progress is arrested by some positive legislative enactment. *Pendergrast et al. vs. Foley, Adm'r.* 8 Ga. 1
17. In Courts of Equity, *fraud* has been held to be an *exception* to the operation of the Statute, until the *discovery* of the fraud. *Ibid.*
18. The *interest* of infants, as contemplated by the Act of 1817, against which the Statute of Limitations does not run, must be such an interest as will enable them to maintain an action in their own name by their guardian, as where the legal title to the property is vested in them. *Ibid.*
19. Where the title to *personal* property of a testator or intestate vests in his executor or administrator, and the Statute of Limitations has operated as a bar to the right of such executor or administrator to maintain an action therefor against one who has converted it, the right of the infant *cestui que trusts* of such executor or administrator, will be also barred. *Ibid.*
20. An adverse possession held during the minority of the true owner,

- cannot operate against his right. *Whittington vs. Doe ex dem. Wright.*
 9 Ga..... 23
21. The Statute does not run against a married woman to whom property had been left in *trust* after her coverture, she being within the exception in the Statute in favor of *femes covert*, in a case where she and her husband are suing in Equity, for the recovery of the property. *Flynt and Wife vs. Hatchett.* 9 Ga..... 322
22. The saving in behalf of infants may preserve the right of one of several co-heirs, who is within the proviso, although the other co-heirs who were under no disability, will be barred. Therefore, in ejectment, by two co-heirs upon a joint demise, one of whom is an infant, judgment may be rendered against the plaintiff who is not within the saving of the proviso, and in favor of the title of the infant. *Lessee of Pendergrast vs. Prather.* 10 Ga..... 218
23. Where executors, administrators and other trustees for infants, fail to sue for personal property within the time prescribed by law, the Statute of Limitations binds the minors; nor are their interests saved under the Act of 1817. *Worthy et al. vs. Johnson et al.* 10 Ga..... 358

V. OF A NEW PROMISE OR ACKNOWLEDGMENT.

1. A debt, when once barred by the Statute of Limitations, can only be revived by a *new* promise, express or implied, and for which the old debt forms the consideration. *Brewster vs. Hardeman et al.* *Dudley.* 139
2. After the dissolution of a partnership, one partner cannot, by a new promise, revive against his co-partners a debt, from the obligation of which they have all once been legally absolved; and therefore, an acknowledgment of a debt, or promise to pay it, made by one partner *after* the dissolution of the firm, and *after the debt has been barred by the Statute of Limitations*, will not revive the debt against his former partners. *Ibid.*
3. But according to "precedent and authority," the admission of a debt by one partner, *after* dissolution and *before the Statute has interposed a bar*, will be binding upon the other partners, so far as to constitute a new point from which the Statute shall commence running. *Ibid.*
4. It is well settled that no advantage shall be taken of admissions made to secure one's peace, or in the way of a compromise; and if an acknowledgment and promise for this purpose be replied to a plea of the Statute of Limitations, the evidence will be rejected. *Hicks & Lord vs. Thomas.* *Dudley.*..... 218

5. But if the Court, from the circumstances, should be of opinion that the subsequent acknowledgment and promise were made from the consciousness of the truth of the indebtedness, the evidence would be considered good and available. *Ibid.*
6. It is a question of the law for the Court to determine as to what constitutes a sufficient acknowledgment to take a case out of the Statute of Limitations. *Sheftall vs. Clay. R. M. Charl.*..... 7
7. An admission from which an existing debt may be necessarily inferred, is sufficient to take the case out of the Statute, though it be accompanied with an express denial of the debt. *Ibid.*
8. A credit entered on a note barred by the Statute of Limitation, does not of itself remove the bar of the Statute; there must be proof that the payment which the credit would indicate, was actually made. *West vs. Johnson. Ga. Dec. part I.*..... 72
9. If there be no express promise to pay, the acknowledgment, in order to avoid the Statute, ought to contain an unqualified admission of a present subsisting debt, which the party is liable to pay, and not merely that the debt was once due. *Dickinson vs. McCamey. 5 Ga.* 486
10. An acknowledgment in the defendant's plea, that the signature to the note sued on is genuine, accompanied with a protestation that the debt has been long since discharged, is not such an acknowledgment as will take the case out of the Statute of Limitations. *Ibid.*
11. An acknowledgment or promise to take a case out of the Statute of Limitations, must specify and plainly refer to the particular debt, or demand, or cause of action which is sought to be revived. *Martin, Adm'r, vs. Broach, Ex'r. 6 Ga.*..... 21
12. Where there is any dispute as to the facts which go to prove the making of a new promise, there (whether a sufficient acknowledgment or promise has been made to take the case out of the Statute) is a mixed question of law and fact to be passed upon by the Jury; but where the facts are undisputed, it is for the Court to determine whether they take the case out of the Statute or not. *Ibid.*
13. A promise to pay a debt barred by the Statute, constitutes a new cause of action, which a party seeking to avail himself of, must declare upon, in the words in which it was made, or according to its legal effect. The old debt is regarded as the consideration which supports the promise; and in declaring, must be set out as the inducement to it. *Ibid.*
14. It is the province of the Court to determine what is in law, such a

promise as will take a case out of the Statute of Limitations; but it is for the Jury to find what promise is in fact made. *Love vs. Hackett, Adm'r, et al.* 6 Ga..... 486

15. A, a joint maker and surety on a note, promised the holder, that if he would not sue on it until a bill to marshal the assets of the principal, who was dead, was determined, and the amount allowed upon the note by the decree was paid, he would pay the balance then due on the note: *Held*, that upon the fulfilling of the conditions, the promise became an absolute promise to pay, and would be a sufficient reply to a plea by A, on a suit against him on the note, of the Statute of Limitations. *Held*, farther—that it was incumbent on the plaintiff to show that the conditions were fulfilled, but that it was not necessary for him to prove that they were fulfilled *before* the institution of the suit; it being sufficient to show that they were fulfilled before the trial. *Ibid.*
16. It is now settled that the acknowledgment, in order to bar the Statute of Limitations, must contain a promise to pay, either express or implied; and that an implied promise is created from an acknowledgment of a present subsisting debt. *Brewer and another, Ex'rs, vs. Brewer.* 7 Ga..... 587
17. In an action upon a negotiable note, barred by the Statute of Limitations, a new promise made by the maker, to a prior holder, is sufficient to take the case without the operation of the Statute. *Bird vs. Adams.* 7 Ga..... 505
18. The case of *Martin vs. Broach*, (6 Ga. Rep. 21,) reviewed and approved. *Ibid.*
19. Letters from the indorser to the holder of a note barred by the Statute, which bear date anterior to six years preceding the institution of suit: *Held*, to be inadmissible to take the case out of the Statute. *Hoadley vs. Bliss.* 9 Ga. 803
20. Where one of four joint and several promissors, promised to pay the debt *before* the Statute of Limitations had operated as a bar, it takes the case out of the Statute as to the others. *Cox, Ex'r, vs. Bailey.* 9 Ga..... 467
21. A new promise may be inferred from the fact of part payment of a note within the six years; and this deduction is not only in accordance with the older cases, but is consistent, also, with the later and more approved decisions under the Statute. *Smith vs. Simms, Adm'r, &c.* 9 Ga..... 418
22. In declaring on a promise, it is not necessary to set it out *in hæc ver-*

ba—it will be sufficient to set it out according to its tenor and effect.
Ibid.

23. To make the indorsement of a payment by the holder of a note admissible evidence to rebut the presumption of the Statute, it must be shown that it was done by the privity of the promisor, or that it was entered when its operation would be against the interest of the party making it. *Ibid.*

24. If, however, the credit is small, as compared with the amount of the debt, and entered just before the bar of the Statute would attach, although proven to have been made at its date, the Jury would be justified in finding against it. *Ibid.*

VI. PLEADING AND EVIDENCE.

1. An admission made to secure one's peace, or in the way of compromise, is not evidence against him; but if the Court, from the circumstances, should be of opinion that the acknowledgment and promise were made from the consciousness of the truth of the indebtedness, the evidence would be considered good and available. *Hicks & Lord vs. Thomas. Dudley* 218
2. Where A holds possession of property in another State, until, under the Laws of Limitation of that State, he acquires title, and B purchases the property of him, and brings it to this State; in an action against B, he may plead the Limitation Acts of the foreign State, and his title under it, in bar of the action. *Wynn vs. Lee, Trustee. 5 Ga.* 217
3. In such a case, an exemplification of the Acts of such foreign State, may be read in evidence, under the general issue. *Ibid.*
4. In Georgia, upon a plea of the Statute of Limitations; and in all other cases, the plaintiff is entitled to prove new matter, in avoidance of the plea. *Henry vs. Peters. 5 Ga.*..... 311
5. A promise to pay a debt barred by the Statute of Limitations, constitutes a new cause of action, which a party seeking to avail himself of, must declare upon in the words in which it was made, or according to its legal effect. The old debt is regarded as the consideration which supports the promise, and in declaring, must be set out as the inducement to it. *Martin, Adm'r, vs. Broach. 6 Ga.*..... 21
6. Where a promissory note is sued on, barred by the Statute of Limitation on its face, and the defendant pleads the Statute, the plaintiff may, under our judicial system and practice, amend his petition by al-

leging a new promise, so as to prevent the operation of the Statute.
Beard and another vs. Simmons. 9 Ga..... 4

7. A new promise may be inferred from the fact of part payment of a note within the six years; and this deduction is not only in accordance with the older cases, but is consistent, also, with the later and more approved decisions under the Statute. *Smith vs. Simms, Adm'r, &c.* 9 Ga..... 418
8. In declaring on a promise, it is not necessary to set it out *in hæc verba*—it will be sufficient to set it out according to its tenor and effect. *Ibid.*
9. To make the indorsement of a payment by the holder of a note admissible evidence to rebut the presumption of the Statute, it must be shown that it was done by the privity of the promissor, or that it was entered when its operation would be against the interest of the party making it. *Ibid.*
10. If, however, the credit is small, as compared with the amount of the debt, and entered just before the bar of the Statute would attach, although proven to have been made at its date, the Jury would be justified in finding against it. *Ibid.*

LIMITATION OF ESTATES. See *Deed; Devise and Legacy.*

LIQUIDATED DEMAND.

1. A demand *liquidated*, is an amount *certain and fixed*, either by the act or agreement of the parties, or by operation of law; nor is it necessary that it should be evidenced by writing. *Nisbet vs. Lawson.* 1 Kelly. 287
2. In order for a demand to be liquidated, it is not necessary that it should be in writing. *Anderson et al. vs. The State.* 2 Kelly..... 374

LIS PENDENS. See *Arbitrament and Award.*

LOST PAPERS.

1. A copy of a guardian's bond, where the original is lost or destroyed, pending the suit, cannot be established under the 49th Rule of the Superior Courts, because such bond is not an office paper of those Courts. *Bryant, Guardian, and another vs. Owens and Wife.* 1 *Kelly.* 368
2. Notice is not indispensably necessary to be given, of a motion to the Court to establish copies of office papers, alleged to be lost or destroyed, under the 20th Rule of Practice of the Superior Courts. *Saunders vs. Smith, Adm'r.* 3 *Kelly*..... 127
3. Where reasonable diligence has been used in searching for a paper in such places where, by law, it may be presumed to have been deposited, if in existence, and by making inquiries of those persons who may be legally presumed to have the custody of it, without success, its loss or destruction will be presumed, especially with regard to papers appertaining to a Court, or connected with the official duties of public officers. *Fretwell vs. Lessee of Morrow.* 7 *Ga.*..... 264
4. When the administrators of deceased co-obligors are sought to be made parties defendant to an application to establish a lost bond, the names of such administrators should be stated in the petition and *rule nisi*, with as much distinctness as in other suits. *Cobb et al. vs. Cobb.* 10 *Ga.*..... 454
5. In an application to establish lost papers, under the 6th section of the Judiciary Act of 1799, such petition must allege that the defendants, or one of them, resides in the County in which the application is made, in order to give that Court jurisdiction of their persons, such application being considered in the nature of a suit. *Ibid.*
6. As to proof of contents of lost papers, see *Evidence, V.*

LUNATIC. See *Idiot, &c.; Insanity.*

MACON.

1. The Act of 1828, which provided that wagons and carriages, loaded with corn and cotton, should pass the Ocmulgee bridge, free of toll, is repealed, *pro tanto*, by the Act of 1847, which vested in the corporate

authorities of the City of Macon, the right to regulate the tolls of said bridge; the latter Act repealing all laws and parts of laws militating against its provisions. *The Mayor, &c. vs. The Macon & Western R. R. Co.* 7 Ga 221

See *Corporations*.

MAGNA CHARTA.

- 1. The words of Magna Charta, that “no freeman shall be taken, or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed, or passed upon, or condemned, but by lawful judgment of his peers, or by the law of the land,” were intended to secure the individual from the arbitrary exercise of the powers of Government, unrestrained by the established principles of private rights, and distributive justice. *Flint River Steamboat Company vs. Foster.* 5 Ga..... 194

MALICIOUS PROSECUTION.

- 1. To support an action for malicious prosecution, it is not necessary to prove an arrest. *Stapp vs. Partlow.* *Dudley*..... 176
- 2. An action for malicious prosecution, in cases of *felony*, cannot be maintained without previously obtaining the order of the Court for a copy of the indictment. *A vs. B.* *R. M. Charl.*..... 228
- 3. An action for a malicious prosecution, cannot be sustained in Georgia, on an indictment for perjury at Common Law. *Ibid.*
- 4. Whether there be probable cause or not, is a mixed question of law and fact; and if testimony be submitted to the Jury on both sides of the question, the verdict will not be disturbed by the Court, be the finding what it may. *Pomeroy vs. Golly.* *Ga. Dec. part I.*..... 26

See *Costs*, I. 2.

MANDAMUS.

1. The power of the Judge of the Superior Courts, to grant the writ of *Mandamus*, is as extensive as the district over which he presides; and he need not be actually within a County, when he grants the writ to an inferior judicature of the County. *Ex parte Carnochan. T. U. P. Charl* 216
2. The writ of mandamus is an established remedy to oblige Inferior Courts and Magistrates to do that justice which, without such writ, they are in duty and by virtue of their office bound to do. *Forsyth vs. The Justices, &c. Dudley*..... 38
3. To sustain an application for mandamus, it is not only necessary that the relator should have a legal right to the thing commanded, but he must also be without a legal remedy. *Ibid.*
4. If a party on a return to an alternative mandamus, show cause against the admission or restoration of a person to an office, on the ground of *non-election*, he must make a *direct* and issuable denial of the fact. *State vs. Mayor, &c. Savannah. R. M. Charl*..... 250
5. A *mandamus* will lie, *it seems*, to compel the Inferior Court to grant a new trial where an illegal verdict has been rendered on the issue of *fraud or not*, in the schedule of an insolvent debtor. *Ex parte Simpson. R. M. Charl*..... 111
6. The writ of mandamus is grantable at any time, either in vacation or in term, on proper cause shown. *Johnson vs. The State ex rel. &c. Kelly*..... 273
7. In all cases, however, where the parties' right may depend upon an issue of fact, the writ must be made returnable before the Judge in term. *Ibid.*
8. The Supreme Court will not grant a *mandamus* against a Circuit Judge, commanding him to certify a second bill of exceptions for the same cause in the same case, the first having been dismissed on the hearing, for irregularity. *Harris vs. The State. 2 Kelly*..... 291
9. To justify a Court in refusing a *mandamus* on account of *laches*, it must be *gross*. *Mayor, &c. Savannah vs. The State, ex rel. Green. 4 Ga.*..... 62
10. At Common Law, it is not a writ of right, but in Georgia. *Quere?*

11. It will never be denied where the right is indisputable, especially if *statutory*, and there is no other remedy. *Ibid.* See also, *Moody vs. Fleming.* 4 Ga..... 115
12. Mandamus is in the nature of a suit. *Moody vs. Fleming. Ibid.*
13. Where commissioners are appointed by an Act of the Legislature, to carry the same into effect, and the Justices of the Inferior Court of the County are required to levy an extra tax to pay the expenses: *Held*, that the commissioners had such a legal interest as would authorize them to apply for a mandamus against the Inferior Court, on their refusal to levy the tax. *Manor et al. vs. McCall et al.* 5 Ga.... 522
14. The Superior Court will not control the discretion of the Inferior Court, where it cannot be governed by some fixed principles or rule, unless in the case of an arbitrary abuse of it. *Ibid.*
15. But where the law imposes a specific duty, a mandamus will be awarded, to compel the subordinate Court to perform that duty. *Ibid.*
16. Where a person is in office under a *prima facie* title thereto, *by color of right*, the remedy to admit another having a lawful claim, is not by *mandamus*, but the appropriate remedy is by information in the nature of a *quo warranto*. *Bonner vs. The State, ex rel. Pitts.* 7 Ga. 473
17. However clear it may be, as a general *legal* proposition, that where a mere ministerial act is required by law to be performed by an Executive officer, and individual rights depend upon the performance of that act, that the proper tribunals of the country have jurisdiction to compel its performance; yet, for *political* reasons alone, the Chief Magistrate of the State cannot be compelled to perform such ministerial act. *The State ex rel. Lowe vs. Towns, Governor.* 8 Ga..... 360
18. Where the relator applying for a mandamus *nisi* against the Governor, to issue to him a commission as Clerk of the Court of Ordinary, had failed to establish his title to the office, by the judgment of a Court of competent jurisdiction: *Held*, that according to relator's own showing, the Court had no jurisdiction to award the *mandamus nisi*. *Ibid.*

MARRIAGE SETTLEMENT. See *Husband and Wife, III.*

MARSHALLING OF ASSETS. See *Equity, I. h.*

MILITIA.

1. The Justices of the Inferior Court are not liable to the performance of militia duty. *State vs. Fort. R. M. Char.*..... 272
2. And it seems that such duty cannot be required from the officers of the Judiciary Department, as organized by the Constitution. *Ibid.*

See *Arrest, I.*

MINUTES OF COURT. See *Record.*

MISREPRESENTATION. See *Equity, I. c.*

MISTAKE.

1. Where money is voluntarily paid by a Tax Collector to a County Treasurer, by mistake, and which was not intended to be received by the latter as belonging to the County, an action lies by the former to recover it back, especially when it does not appear that the money has ever been paid over to the County. *Laird vs. Nunne. 3 Kelly....* 92
2. Money paid by mistake of the law, may be recovered back in an action for money had and received, where there is a full knowledge of all the facts: *Provided*, the mistake is clearly proven, and the defendant cannot in good conscience retain it. *Culbreath vs. Culbreath. 7 Ga* 64
3. Distinction taken between *ignorance* and *mistake* of the law. *Ibid.*
4. A construction given to the maxim, "*ignorantia juris, excusat neminem.*" *Ibid.*

See *Equity, I. c.* ; *Mortgage, I. 14* ; *New Trial, VI.*

MONTHS. See *Time.*

MORTGAGES.

I. GENERALLY.

II. LIEN: AND HEREIN OF REGISTRY AND PRIORITY.

III. FORECLOSURE: EXECUTION, &c.

AS TO PRIORITY IN DISTRIBUTION OF ESTATES, see *Administrators, &c. V.*

I. GENERALLY.

1. The equitable powers of the Superior Courts of Georgia, in suppressing frauds, will be exercised in aid of a mortgagor seeking to be relieved from a usurious contract, notwithstanding the Judiciary Act points out a method by which he may, at Common Law, dispute the sum due. *Winn vs. Ham and Mara. R. M. Charl.*..... 70
2. A mortgage, before foreclosure, cannot claim money by rule, in a Court of Law. *Habersham and Son vs. Miller et al. Ga. Dec. part II.* 46
3. A mortgage under our law is a mere incumbrance to pay a debt, and is not within the Act of 1818. *Seals and Upham vs. Cashin et al. Ga. Dec. part II.*..... 76
4. A mortgage would be obnoxious to the Act of 1818 and void, if used as an instrument of fraud, for the purpose of securing to the mortgagor a *secret* trust or benefit, within the intent and meaning of said Act. *Davis et al. vs. Anderson et al. 1 Kelly.*..... 193
5. But a mortgage executed by a debtor in insolvent circumstances, to a creditor, to secure the payment of a *bona fide* pre-existing debt, is not, *per se*, fraudulent as against creditors. *Ibid.*
6. A mortgage in Georgia is nothing more than a security for the payment of a debt, and the title to the mortgaged property remains in the mortgagor until foreclosed and sale in the manner pointed out by Statute. *Ibid.*
7. Where the *cestui que trust*, a married woman, is authorized by the deed creating this trust, "to sell and dispose of the estate and re-invest the proceeds, &c." she may *mortgage* the trust property to secure the purchase money for other property purchased by her. *Wayne, Trustee, et al. vs. Myddleton et al. 2 Kelly.*..... 402
3. When the surety to a promissory note was indemnified by a mortgage,

and after the note became due, the surety *voluntarily* gave his own note to the creditor in *full payment* of the joint debt: *Held*, that the surety might foreclose his mortgage, and collect what was actually due on the note in the hands of the original creditor; and that the principal debtor was entitled to make any defence which he could have made against such original creditor. *Mims vs. McDowell*. 4 Ga. 182

9. Where a creditor, who is the mortgagee, forecloses his mortgage, and purchases the mortgaged property at Sheriff's sale under it, and suffers the mortgagor to retain possession after the sale, such possession is a badge of fraud, as against other judgment creditors. *Williams vs. Kelsey & Halsted*. 6 Ga..... 365

10. Where property is levied on by a judgment creditor, and claimed by a purchaser, under a sale made in pursuance of a judgment of foreclosure of a mortgage under our Statute: *Held*, that such judgment of foreclosure was *prima facie* evidence of indebtedness by the mortgagor to the mortgagee; and that the burden of showing a want of consideration for the mortgage, rests upon the plaintiff in execution, and not the claimant. *Ibid*.

11. Whether the consideration for which a mortgage is alleged to have been executed, is *bona fide*, or merely colorable, to defraud creditors, or so inadequate as to constitute a badge of fraud, is a question of fact, which should be left to the Jury upon the whole evidence in the case, without any restriction on the part of the Court, as to the necessity of proving *all the items of indebtedness* alleged to have been the consideration of such mortgage. *Ibid*.

12. In this State, a mortgage is considered as only security for the debt of the mortgagor. The mortgaged property, after the foreclosure of the mortgage, is directed to be sold; and after payment of the mortgage debt, the surplus, if any, is to be paid to the mortgagor. *Winter vs. Garrard et al*. 7 Ga..... 183

13. The general rule is, that when mortgaged property is levied on by an execution, issuing upon a general judgment, and sold under the incumbrance of the mortgage, the purchaser gets only the mortgagor's equity of redemption; and the proceeds of such sale belong to the mortgagor, or his general judgment creditors. *Ibid*.

14. Where a mortgagee had foreclosed his mortgage, and obtained an execution against the mortgaged property, which had been levied by the Sheriff, and had also obtained a general judgment for the same debt, the *fi. fa.* on which, had been levied on the same property, and advertised for sale on the same day, and the whole *corpus* of the property was sold by the Sheriff under the general judgment, subject to the mortgage lien, by the direction of the mortgagee, under a *mistake*

that the equity of redemption of the mortgagor could not be sold, after the foreclosure of the mortgage: *Held*, that inasmuch as the whole *corpus* of the property was sold for its full value, and the same not being sufficient to extinguish the mortgage debt, that in the distribution of the proceeds of the sale, under the peculiar facts of the case, the mortgagee having the oldest lien was *equitably* entitled to have the money applied thereto. *Ibid*.

15. Where B executed a deed of assignment to C, in trust, for the benefit of certain creditors, which deed was void under the Act of 1818, and subsequently executed a mortgage of the same property, to secure the payment of a *bona fide* debt: *Held*, that the *mortgagees*, as creditors, might avoid the first conveyance, and have the proceeds of the property mortgaged, applied to the payment of their mortgage debt; that, as against them, the first conveyance was in law, a nullity. *Lee et al. vs. Brown et al.* 7 *Ga.*..... 275

16. When a creditor takes a mortgage to secure the payment of a promissory note, and the remedy on the latter is barred by the Statute of Limitations, his remedy on the mortgage is not necessarily barred, the debt being unpaid, but he may avail himself of his statutory remedy on the mortgage. *Elkins vs. Edwards.* 8 *Ga.*..... 325

17. A sale of property by J. to G. and an obligation by G. to re-convey the same property on certain conditions, when the transaction does not create the relation of debtor and creditor between the parties, is not a mortgage, and G. will only be held to a compliance with the terms of his bond. *Galt vs. Jackson.* 9 *Ga.*..... 151

18. In Georgia, a mortgage is only an incumbrance or security for a debt. *Ragland vs. The Justices, &c.* 10 *Ga.*..... 65

19. Twenty years' possession of the mortgaged property, by the mortgagee, under the mortgage, will, *prima facie*, bar the mortgagor's right to redeem; and this is true, whether the mortgage is on real estate or personal property. *Morgan, Adm'r, vs. Morgan, Ex'x.* 10 *Ga.*..... 297

20. But no length of time will bar the mortgagor's right to redeem, so long as the mortgagee recognizes the conveyance as a subsisting mortgage. Any acts or circumstances which show a recognition of the mortgage within twenty years, will prevent the bar, and the time will begin to run only from the latest recognition within that period. It lies upon the mortgagor to show such recognition. *Ibid*.

21. The mortgagee in possession holds the property in the character of trustee for the mortgagor, and may disavow the trust and disclaim the mortgage; and in that event, the time of limitation provided by the Statute for the recovery of the property at Law, will begin to run

in his favor from the disavowal; and if he then holds the possession for the statutory term, the mortgagor's right to redeem is barred. *Ibid.*

22. When the mortgagee relies upon the Statute after a disavowal of the trust, it lies upon him to show the disavowal, and to bring home to the mortgagor knowledge of the fact, and this knowledge cannot be shown constructively. *Ibid.*

See *Claim*, 4.

II. LIEN: AND HEREIN OF REGISTRY AND PRIORITY.

1. If a mortgage be taken to secure the payment of two notes becoming due at different times, and the mortgagee foreclose and sell upon the first note that becomes due, and the mortgaged property be sold for more than enough to pay the first note, the surplus in the Sheriff's hands is discharged from the special lien; and if other creditors of the mortgagor obtain judgment in the ordinary course of law, before the mortgagee forecloses upon the second note, the surplus shall be paid over to them according to date. *Hobbs vs. Pemberton. Dudley.* 212
2. A creditor who has obtained judgment against his debtor, and levied his execution upon property mortgaged to another person anterior to his judgment, and which mortgage has been properly recorded, can only sell the equity of redemption of his debtor. *Jewitt et al. vs. McGowen. R. M. Charl.*..... 391
3. And therefore, such creditor, and not the mortgagee, is entitled to the proceeds of the sale under such execution. *Ibid.*
4. A foreclosure of a mortgage under the Statute of Georgia, does not vest the absolute estate in the mortgagee; it only authorizes a sale of the property, and the surplus, after the payment of the mortgage and costs, belongs to the mortgagor. *Ibid.*
5. The lien of a junior mortgage is destroyed by sale of the premises, under foreclosure of an elder one. *Habersham & Son vs. Miller et al. Ga. Dec. part II.*..... 46
6. But the junior mortgage has an equitable claim to the proceeds of the sale, after paying the elder. *Ibid.*
7. A mortgagee cannot enforce his mortgage against the property of a subsequent purchaser, as long as there is other property of the mortgagor remaining, sufficient to satisfy the mortgage debt; he can resort to the property sold only for what remains unpaid of his claim, after

- the mortgage estate is exhausted. *Cumming vs. Cumming et al.* 3
Kelly..... 468
8. Under the Act of 1827, requiring mortgages to be recorded: *Held*, that the junior mortgagee, *with notice* of the prior lien, gains no preference by having his mortgage recorded. *Neal vs. Kerrs and Hope*. 4 *Ga.*..... 161
9. If the mortgagor of personal property fails to record his mortgage, a *bona fide* purchaser from the mortgagor, *without notice*, will be entitled to retain the property. *Cumming vs. Early*. R. M. *Charl.*..... 140
10. When a creditor takes a mortgage to secure the payment of a promissory note, and the remedy on the latter is barred by the Statute of Limitations, his remedy on the mortgage is not necessarily barred. *Elkins vs. Edwards*. 3 *Ga.*..... 325

III. FORECLOSURE: EXECUTION, &c.

1. The executor or administrator, and not the heir, is the proper party to be made defendant in foreclosure, in the event of the mortgagor's death. *Adm'rs of Magruder vs. Adm'rs of Offut*. *Dudley*..... 227
2. And the principle is the same, under our law, whether the subject of the mortgage be real estate or personal property; the heirs cannot be joined as defendants in the foreclosure. *Ibid.*
3. Any Judge of the Superior, or Justice of the Inferior Court in Georgia, (without reference to the residence of defendant,) may issue the *fiat* for the foreclosure of a mortgage of personal property. *Guerard & Polhill vs. Polhill*. R. M. *Charl.*..... 237
4. When such *fiat* is granted by a Judge of the Superior Court, the Clerk of a Superior Court of a different County and circuit, from that in which the *fiat* was granted, may issue the execution. *Ibid.*
5. And *it seems* that the execution may be directed to all and singular the Sheriffs of the State. *Ibid.*
6. Where one section of a Statute, without negative words, introduced a new mode of foreclosing a mortgage of personalty, and pointed out a method by which the mortgagor might dispute the sums due on the execution founded on such foreclosure, and a subsequent section of the same Statute, also without negative words, allowed a defendant to make an affidavit of illegality, in *all* cases where execution had issued illegally: *Held*, that the remedy in the latter section was not cumulative to the former, and that it referred to executions *other* than those mentioned in the first section. *Ibid.*

7. *It seems* that under the mode prescribed by the 18th section of the Judiciary Act of 1799, the mortgagor may enter into any defence which may entitle him to relief from the execution. *Ibid.*
8. There is nothing unconstitutional in that section. *Ibid.*
9. A bond was made, payable at a distant day, with lawful interest, payable *annually*; to secure which, a mortgage was given, with a proviso, that in default of payment of the principal sum or the interest, at any time when the same should become due, it should be lawful to foreclose the same: *Held*, that the mortgagee had the right, from the contract of the parties, to foreclose the mortgage and collect the whole debt, principal and interest, on the failure of the mortgagor to pay the first year's interest when it became due. *Shellman et al. vs. Scott. R. M. Charl.*..... 380
10. A foreclosure of a mortgage, under the Statutes of Georgia, does not vest the absolute estate in the mortgagee; it only authorizes a sale of the property, and the surplus, after payment of the mortgage and costs, belongs to the mortgagor. *Jewitt et al. vs. McGowen. R. M. Charl.*..... 391
11. After foreclosure of a mortgage, the mortgagee cannot sell the property; after a sale on another *fi. fa.* though of junior date, he must claim the proceeds of the sale. *Willis vs. McIntosh. Ga. Dec. part I. 162. Contra, Howard et al. vs. Jones et al. Ga. Dec. part II.*..... 190
12. After foreclosure, the mortgagor's right of redemption is gone. *Ibid.*
13. Upon a rule to foreclose a mortgage, under the Statute of Georgia, the mortgagor may show, by way of defence, that the contract to secure which it was given, was usurious. *Baily vs. Lumpkin. 1 Kelly.* 403
14. A third person who is not a party to the record, will not be permitted to make objections to the foreclosure of a mortgage, under our Statute, until he has been regularly made a party by the judgment of the Court. *McDougald vs. Hall. 3 Kelly.*..... 175
15. When the surety to a promissory note was indemnified by a mortgage, and after the note became due, the surety *voluntarily* gave his own note to the creditor *in full payment* of the joint debt: *Held*, that the surety might foreclose his mortgage, and collect what was actually due on the note in the hands of the original creditor; and that the principal debtor was entitled to make any defence which he could have made against such original creditor. *Mims vs. McDowell. 4 Ga.* 182
16. In this State a mortgage is considered only as a security for the

debt of the mortgagor. The mortgaged property, after the foreclosure of the mortgage, is directed to be sold; and after payment of the mortgage debt, the surplus, if any, is to be paid to the mortgagor.

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17. The general rule is, that when mortgaged property is levied on by an execution issuing upon a general judgment, and sold under the incumbrance of the mortgage, the purchaser gets only the mortgagor's equity of redemption; and the proceeds of such sale belong to the mortgagor, or his general judgment creditors. *Ibid.*

18. Where a mortgagee had foreclosed his mortgage, and obtained an execution against the mortgaged property, which had been levied by the Sheriff, and had also obtained a general judgment for the same debt, the *fi. fa.* on which had been levied on the same property, and advertised for sale on the same day, and the whole *corpus* of the property was sold by the Sheriff under the general judgment, subject to the mortgage lien, by the direction of the mortgagee, under a *mistake* that the equity of redemption of the mortgagor could not be sold, after the foreclosure of the mortgage: *Held*, that inasmuch as the whole *corpus* of the property was sold for its full value, and the same not being sufficient to extinguish the mortgage debt, that in the distribution of the proceeds of the sale, under the peculiar facts of the case, the mortgagee having the oldest lien was *equitably* entitled to have the money applied thereto. *Ibid.*

19. Judgments on the foreclosure of mortgages, are not within the Act of 1823, which declares null and void all judgments on which no execution has issued; or if issued, upon which no return has been made within seven years. *Butt, Trustee, vs Maddox.* 7 Ga..... 496

MURDER. See *Criminal Law*.

NEGROES. See *Citizens; Slaves, &c.*

NEW TRIALS.

- I. GENERAL PRINCIPLES AND MATTERS OF PRACTICE.
- II. OBJECTIONS TO JURORS : MISBEHAVIOR, &c.
- III. VERDICTS CONTRARY TO LAW, EVIDENCE, &c. AND HEREIN OF EXCESSIVE DAMAGES, &c.
- IV. NEWLY DISCOVERED EVIDENCE.
- V. MISDIRECTION OF JUDGE : ADMISSION OR EXCLUSION OF EVIDENCE.
- VI. SURPRISE AND OTHER GROUNDS.

I. GENERAL PRINCIPLES AND MATTERS OF PRACTICE.

1. The granting or refusal of a new trial must depend upon the legal discretion of the Court, guided by the nature and circumstances of the particular case. *Irwin vs. Morell. Dudley*..... 74
2. The affidavits of Jurors are not admissible, on the motion for a new trial to impeach the verdict. *State vs. Doon and Diamond. R. M. Char.* 1
See also, *Bishop vs. The State. 10 Ga.*..... 121
3. A new trial may be granted on terms. *Fell vs. Abbott. R. M. Ch.* 452
4. A new trial will not be granted to furnish an opportunity to impeach the credibility of a witness, who gave testimony on the trial. *State vs. Henley. R. M. Ch.*..... 505
5. After verdict, when the motion for a new trial is considered, the Court must judge not only of the competency, but of the effect of evidence. *Ibid.*
6. *Quere.* If a new trial can be granted on the merits, in a case beyond a misdemeanor? *Ibid.*
7. Such new trial will not be granted when the presiding Judge is satisfied of the correctness of the verdict. *Ibid.*
8. The Court will not hear a motion for a new trial at the next term after judgment was rendered, unless there was some action of the Court to stay the proceedings, although the counsel give notice of the application and the grounds. *Administrator of Spann vs. Executor of Fox. Ga. Dec. part I.*..... 1
9. The affidavit of a Juror in a civil case, cannot be received to show

what transpired in the jury room, for the purpose of impeaching a verdict returned by him under oath, and to which he must have assented. *Ibid.*

10. When the principles of justice require that a new trial should be granted, the Court will look into the evidence, and decide upon the consideration it is entitled to. *The State vs. Powers. Ga. Dec. part I.* 150
11. In cases of doubt, especially after two concurrent verdicts, a new trial will not be granted. *Davis, Guardian, vs. Executor of Hale. Ga. Dec. part II.*..... 82
12. In applications for new trials, a brief of the testimony, approved by the Court, or agreed upon by the parties or their counsel, must be filed; and such approval or agreement, as the case may be, must be entered upon the minutes at the term at which the judgment is rendered, and the rule for new trial is applied for. *Graddy vs. Hightower et al.* 1 *Kelly*..... 254
13. A rule *nisi* for a new trial will not be granted in this State, at the instance of a party, unless application is first made during the term at which the judgment was rendered, and unless such application appear upon the minutes of that term. *Ibid.*
14. The Judge may make rules for new trials returnable in vacation, in cases where the application has been first made and recorded; and where the record shows that such rule is made so returnable in vacation. *Ibid.*
15. Where the term of the Court wherein the judgment was rendered, has passed, and no application made and recorded at that term, the record in the cause having been finally made up, the Court has no power to grant a new trial, except in some peculiar and extraordinary cases. *Ibid.*
16. Another Judge than the one who presided at the trial of the cause, may preside on the motion for a new trial. It is desirable, however, unless prevented by Providential cause, to submit the brief of the testimony to the Judge who tried the case, to be revised and approved by him. *Field vs. Thornton.* 1 *Kelly*..... 309
17. A case upon a *new trial*, after a verdict by a *petit* Jury, or a confession of judgment upon the first trial, is in the nature of an *appeal*, and is to be regulated by the rules of practice which are applicable to appeals; and either of the parties litigant may make any amendment of the declaration or answer, they may deem necessary. *Ibid.*
18. In all applications for a new trial in the Superior Court, a brief of the evidence in the cause, must be filed by the party applying for such

- new trial, under the revision and approval of the Court, at the term of the Court at which the application is made, in conformity to the 61st rule of Practice. *Petty et al. vs. Mahaffey*. 3 *Kelly*..... 220
19. The Judges may make rules for new trials, returnable in vacation, where the application has first been made in term and recorded. *Johnson vs. Bemis*. 4 *Ga*..... 157
20. A motion for a new trial will not be entertained, where a *brief* of the testimony has not been filed. *Hartridge vs. Wesson*. 4 *Ga*. 101. See also, *Turner vs. Rawson*. 5 *Ga*..... 399
21. Where the law and the facts are fairly submitted to the Jury, by the Court below, a new trial will not be granted. *Craft vs. Jackson*. 4 *Ga*. 360
22. New trials may be granted in Equity causes. *Nell vs. Snowden*. 5 *Ga* 1
23. In an issue of *devisavit vel non*, the Court will not remand the cause for a re-hearing, on account of irregularities on the trial, being satisfied from the testimony that justice has been done; especially if the will itself appears to be reasonable, and the Court and Jury below concur in opinion, as to the capacity of the testator, and the fairness of the will. *Beall vs. Mann, Ex'r*. 5 *Ga*..... 456
24. Courts of Equity have jurisdiction to order a new trial in a Common Law Court, after judgment, on a proper case made; but it is a jurisdiction which should be exercised with great caution and circumspection. *Booth and another vs. Stamper*. 6 *Ga*..... 172
25. The Inferior Court has no authority to grant a new trial in Georgia. *Ibid*.
26. If the finding of the Jury is in conformity with the charge of the Court, and no complaint is made of the charge, the refusal to set aside the verdict and grant a new trial will not be reversed, although the law may not have been properly submitted, the corrective Court being satisfied with the verdict. *The Mayor, &c. vs. Howard*. 6 *Ga*... 213
27. As a general rule, the Supreme Court will always more readily control the discretion of the Court below, in refusing a new trial than in granting it, for the reason that a refusal to grant a new trial operates as a final adjudication of the rights of the parties. *Oliver vs. Pace and Biggers*. 6 *Ga* 185
28. Where the Court below fairly submits the facts in the case to the consideration of the Jury, and there is no error in law in the charge of

- the Court, this Court will not disturb the verdict of the Jury. *Garland vs. Milling, Ex'r.* 6 Ga..... 310
29. The Superior Courts have power and authority, under the Constitution and the 55th section of the Judiciary Act of 1799, to grant new trials from the first verdict that may be rendered in a cause. *Spears vs. Smith.* 7 Ga..... 486
30. Wherever there is any doubt, as to the justice or legality of the verdict of the Jury, the Supreme Court will not control the discretion of the Court below, in granting a new trial. *Ibid.*
31. On application for new trials, a brief of the testimony required by the 61st Common Law Rule of Court, need not be entered on the minutes of the Court, but must be of file. *Ibid.*
32. Where the Jury found a verdict for a greater amount of damages than was claimed in the plaintiff's declaration, and a motion for a new trial having been made upon that ground, the plaintiff entered a remittiter for the excess: *Held*, that he had the right to enter such remittiter, and that a new trial on that ground ought to have been refused. *Griffin vs. Witherspoon.* 8 Ga..... 113
33. In all applications for a new trial in the Superior Courts, a brief of the testimony in the cause must be filed by the party applying for a new trial, under the revision and approval of the Court, at the term at which the application is made, in conformity to the 61st Common Law Rule of Practice, and the fact must be evidenced in writing. *Tomlinson vs. Cox.* 8 Ga..... 111
34. A brief of the testimony which refers to executions, judgments and interrogatories, as being attached, when in fact no such papers are appended, is fatally defective; and the omission cannot be supplied by the certificate of the presiding Judge, that he recognizes such documents as in Court before him, on the final hearing of the motion. *Ibid.*
35. The best mode of making out the brief of the testimony, is to embody in it an abridged statement of the oral, and a copy of the written evidence. *Ibid.*
36. Upon applications for a new trial, it is the better practice, where the rule *nisi* is granted upon any of the grounds taken, to let *all* the grounds stand over for consideration upon a motion to make the rule absolute. *Stanley vs. The State.* 10 Ga..... 82
37. Where, on a motion for a new trial, a brief of the evidence had been agreed on by the counsel for the parties, and filed in the Clerk's office

at the term of the Court at which the rule *nisi* was granted, but such agreement was not entered on the minutes at that term: *Held*, on a motion to dismiss the rule *nisi* on that ground, at a subsequent term, that the Supreme Court will not control the discretion of the Court below, in ordering the agreement to be entered on the minutes, *nunc pro tunc*. *Hardin et al. vs. The Justices, &c.* 10 Ga..... 98

38. Applications for new trials are not favored by the Courts. *Berry vs. The State.* 10 Ga..... 511

II. OBJECTIONS TO JURORS: MISBEHAVIOR, &c.

1. In criminal cases, if Juries mistake law and fact, or draw improper conclusions from given facts, to prevent injustice, the Court will sometimes grant a new trial, even where there has been no corrupt or improper conduct on the part of the Jury. *State vs. Simmons. Dudley.* 27
2. If a Jury be guilty of gross misconduct, the Court will not hesitate to grant a new trial. *State vs. Shelbourne. Dudley*..... 28
3. The fact that one of the Jury who tried the cause on the appeal, was security on appeal, though good cause of challenge, is not of itself sufficient ground of new trial; but if it were shown that the Juror acted under improper motives and principles, a new trial would be granted. *Glover vs. Woolsey et al. Dudley*..... 85
4. If there is good cause of challenge, unknown to the party at the trial, a new trial may be granted; but the party will not be permitted to take advantage of an ignorance which is the result of gross neglect. *Ibid.*
5. It is no ground for a new trial, that a part of the Jury separated from the rest, without the knowledge of the Court or the presence of an officer, unless there was evidence that they were tampered with, which might be presumed, if the absence was for a considerable length of time. *The State vs. Fox. Ga. Dec. part I,* 35. See, also, *The State vs. Peter. Ibid.*..... 46
6. That a Jury had spirits in their room, of which they did not drink, is no ground for a new trial. *Gilmer et al. vs. Cameron. Ga. Dec. part I*..... 142
7. When Jurors converse with a witness who testified before them, after being charged with a case, a new trial will be granted. *The State vs. Brazil. Ga. Dec. part II*..... 107
8. Wherever an objection to a Juror, which would be good ground of

challenge to the favor, is not discovered till he is sworn, it will be good ground for a new trial. *Monroe vs. The State.* 5 Ga..... 85

9. A Juror will be heard in his own vindication. *Ibid.*

10. Where there has been any improper separation of the Jury, during the trial, the presumption is, that it is hurtful to the prisoner, and the onus is on the State, to show it is not. *Ibid.*

11. It is competent for a Juror, whose verdict is impeached on the ground of a previously expressed opinion against one of the parties, to support his verdict by an affidavit, denying any alleged declarations, or explaining them; and if thus denied or satisfactorily explained, a new trial will not be granted. *The Mayor, &c. vs. Goetchius.* 7 Ga..... 139

12. It is ground for a new trial, if one of the Jurors, before the trial, makes declarations which clearly indicate that he is not above all exceptions, and that his opinion is not a hypothetical one, dependent upon the whole proof, but is formed exclusively in reference to the evidence which shall be adduced on the part of the prosecution. *Bishop vs. The State.* 9 Ga..... 121

13. A new trial will not be granted for irregularity in the verdict, in this, that the Jury heard the statements of one of their fellows in relation to the case, in their box, unless a brief of the evidence be filed in pursuance of the rule of Court. *Davis vs. Bowman and another, Adm'rs, &c.* 9 Ga..... 504

14. The Court will not, in such a case, grant a new trial, if it is clear and manifest that there was evidence sufficient to sustain the finding, wholly independent of the statements made in the Jury-box. *Ibid.*

III. VERDICTS CONTRARY TO LAW OR EVIDENCE: AND HERE- IN OF EXCESSIVE DAMAGES.

1. Where the verdict of the Jury is contrary to the charge of the Court, a new trial will be granted. *The Bank vs. Marchand. T. U. P. Charl* 247

2. In a case which turned entirely upon a matter of fact, where the evidence was contradictory, and the Special Jury had decided, and there were no suspicions of fraud or corruption against the Jury, the Court refused to grant a new trial. *Flournoy vs. Coxe. Dudley*..... 6

3. When a verdict is glaringly against the weight of evidence, and must inevitably work injustice, a new trial may be granted. *Irwin vs. Morell. Dudley* 74

4. But where there has been evidence on both sides, it being the peculiar province of the Jury to determine the relative weight of conflicting evidence, the Court, although it may differ with the Jury on the point of preponderance, will not disturb the verdict. *Ibid.*
5. By the 28d section, 3d division of the Penal Code of 1817, the Jury are declared to be judges, *both of law and fact*; and yet, if they were to pronounce a verdict grossly and manifestly wrong, the Court would unquestionably grant a new trial; but where the verdict is in accordance with the justice of the case, and the punishment is at the discretion of the Court, the verdict will not be disturbed. *State vs. Sims. Dudley* 214
6. If the verdict be clearly against evidence, a new trial will be granted. *Fell vs. Abbott. R. M. Charl.* 452
7. But where there has been conflicting testimony, and the case has been fairly submitted to the Jury, and it does not appear that any rule of law has been violated, or injustice done by the verdict, a new trial will not be granted. *Ibid.* See, also, *Sheftall vs. Clay. R. M. Charl.* 7
8. A new trial will not be granted, when a mass of conflicting evidence has been submitted to the Jury. *Knight vs. Mantz. Ga. Dec. part I.* 22
9. In actions sounding in *tort*, the damages must be so outrageously excessive as to raise the presumption that the Jury acted more from prejudice than sound judgment. *Poneroy vs. Golly. Ga. Dec. part I..* 26
10. When the circumstances of guilt are slight, in a high criminal case, the Court will grant a new trial. *The State vs. Powers. Ga. Decisions, part I.* 150
11. A new trial will be granted, if the verdict is contrary to the evidence. *McBride vs. Whitehead. Ga. Dec. part I.* 165
12. But the verdict must be clearly wrong, to authorize a new trial. *Mayor vs. Wiltberger. Ga. Dec. part II.* 20-157
13. Where there is conflicting evidence, a new trial will not be granted, merely because the verdict is contrary to the weight of evidence. *Bagshaw vs. Dorsett. Ga. Dec. part II.* 42, 82, 136, 161, 164
14. The Supreme Court will not grant a new trial, in a criminal case, unless some principle of law has been clearly violated, or where there is manifestly *no evidence* to sustain the verdict; the more especially, when the presiding Judge, in the exercise of his discretion, has refused the application in the Court below, when all the circumstances attending the trial must have been fresh in his recollection. *Jones vs. The State. 1 Kelly* 618

15. An application for a new trial will not be granted on the ground that the verdict is contrary to evidence, provided there was testimony enough to warrant the finding, and the Court was satisfied that justice has been done. Neither will the motion be sustained because the verdict was contrary to the charge of the presiding Judge, if the charge itself was erroneous. *Peck vs. Land.* 2 *Kelly*..... 115
16. The Supreme Court will rarely, if ever, control the discretion of the Circuit Judge in granting or refusing a new trial in a criminal case, because the finding was contrary to evidence, provided there was proof sufficient to warrant the verdict. *Hudgins vs. The State.* 2 *Kelly*.. 183
16. Where the presiding Judge has refused a new trial, moved for upon the ground of a finding contrary to the evidence, the Supreme Court will interfere and grant a new trial only in cases that are strong and unequivocal. *Roberts vs. The State.* 3 *Kelly*..... 322
17. Where the testimony is conflicting as to the character of the house alleged to have been burned by the defendant, a new trial will not be granted, where the law and the facts have been fairly submitted to the Jury. *McLane vs. The State.* 4 *Ga.*..... 335
18. Although the issue be exclusively one of fact, and there have been two concurrent verdicts, yet if the finding be clearly against law, a new trial will be granted, especially where an important principle is involved, and the verdict is to be followed by serious consequences to the party against whom it is found. *Chambers vs. Collier.* 4 *Ga.* 193
19. On a question of fraud, a new trial will not be granted, where there was evidence on both sides, and no rule of law violated, nor manifest injustice done; although there may appear to be a preponderance of evidence against the verdict. *Armistead vs. Barker.* 4 *Ga.*..... 170
20. Where the verdict is *without evidence*, or *clearly against evidence*, the Court is bound to grant a new trial. *Hall vs. Page.* 4 *Ga.*..... 428
21. Where one of the defendants was a *bona fide* holder of a promissory note, and there was no evidence to impeach the consideration in his hands, the amount of which was not allowed by the Jury: *Held*, that the discretion of the Court below, in granting a new trial to the defendants, was properly exercised. *Oliver vs. Pace and Biggers.* 6 *Ga.* 185
22. A verdict will not be set aside, and a new trial granted, where the case has been fairly submitted on its merits, and no rule of law violated, nor manifest injustice done, although there may appear to have been a *preponderance* of evidence against the verdict: especially if the Judge who tried the case is satisfied with the finding. *Giles vs. The State.* 6 *Ga.*..... 276

23. On the trial of a slave charged with a capital offence, and a verdict of guilty, the Court will not interfere to grant a new trial, on the ground that the evidence was not sufficient to authorize a verdict, where there is *some* evidence for the consideration of the Jury, and no error in law apparent on the face of the record. *Alfred vs. The State.* 6 Ga..... 483

24. In personal *torts*, such as libels, batteries, *crim. cons.* malicious prosecution, &c. the Court will rarely interfere and grant new trials, either on account of the *excess* or *smallness* of the damages; it being the peculiar province of the Jury, in such cases, to estimate the injury. *Bishop & Parsons vs. The Mayor, &c.* 7 Ga..... 200

25. But even in personal *torts*, where the Jury have clearly abused their power, and evinced a total disregard of the proof, the Court will interfere and order a new trial. *Ibid.*

26. But in cases where the Jury have a certain measure of damages to go by, no such latitude is allowed them: and the Court will look to the circumstances, and grant or refuse a new trial, according to the circumstances of the case. *Ibid.*

27. Where there is a variety of testimony on both sides, and the case is fairly submitted to the Jury, and no injustice has been done, the Court will not interfere with the verdict, upon matters of fact, and especially where fraud in fact is in issue, by granting a new trial. *Stroud vs. Mays and another.* 7 Ga..... 269

28. To justify the Court in setting aside the verdict of the Jury, where there is contradictory testimony, and there has been no misdirection in any matter of law, and as to matter of fact, the case has been fairly open before them, and peculiarly within their province, it should be able to say, judicially, that the conclusion to which they have come is clearly erroneous, and must have arisen from some unquestionable mistake or some improper motive or bias. *Ibid.*

29. A new trial will not be granted upon matters of fact, unless upon the most unequivocal evidence, that injustice has been done the party complaining. *Killen vs. Sistrunk and Wife.* 7 Ga..... 283

30. Where, however, it is manifest to a reasonable certainty, that justice has not been done; as, for instance, where gross mistakes appear in the calculation upon which the verdict was rendered, a new trial will be ordered. *Ibid.*

31. Where the Jury found a verdict for a greater amount of damages than was claimed in the plaintiff's declaration, and a motion for a new trial having been made on that ground, the plaintiff entered a remitti-

- ter on the record for the excess: *Held*, that the plaintiff had the right to enter such remittiter, and that a new trial on that ground ought to have been refused. *Griffin vs. Witherspoon*. 8 Ga..... 113
32. Where the evidence is conflicting in regard to the main point in controversy between the parties, the admission of illegal evidence by the Court, which might, and probably did decide the question in favor of the plaintiffs, in the mind of the Jury, a new trial will be granted. *Settle vs. Allison et al.* 8 Ga..... 201
33. Where there is conflicting evidence, a mere preponderance against the verdict of the Jury, is not sufficient to authorize a new trial. *Flournoy vs. Newton*. 8 Ga..... 306
34. Where the Jury find a verdict contrary to the charge of the Court, and manifestly contrary to law, a new trial will be granted. *Tyler vs. Gray*. 9 Ga..... 408
35. The Supreme Court will not control the discretion of the Circuit Court in refusing a new trial, upon the ground that the Jury found contrary to the evidence, except in clear and strong cases of injustice. *Bond vs. Baldwin*. 9 Ga..... 9
36. It is competent for Courts to set aside verdicts for excessive damages, where there are rules by which damages may be measured—as in actions on contracts, or for *torts* done to property, the value of which may be ascertained by evidence, a new trial will be awarded if the finding be contrary to the evidence. *Lang et al. Executors, vs. Hopkins*. 10 Ga..... 37
37. In suits for personal injuries, where the Court must conclude from the exorbitancy of the damages, that the Jury acted from passion, partiality or corruption, the verdict will be set aside. *Ibid*
38. Courts will never, in the absence of the most satisfactory evidence that the verdict is erroneous, substitute their impression for the opinion of the Jury. *Ibid*.
39. The Supreme Court will not award a new trial upon the ground that the verdict is contrary to the evidence, where there is conflicting testimony. *Fowler vs. Waldrip*. 10 Ga..... 350
40. Where the Court instructs the Jury that in weighing the evidence, they are to give most weight to those who are not under the influence of any bias, the Supreme Court cannot infer that the Jury disregarded the charge, from the fact that their verdict was in accordance with the evidence of the daughter of the party in whose favor it was rendered. *Ibid*.

41. If the verdict is contrary to the evidence, and cannot be sustained upon any hypothesis consistent with the testimony, a new trial will be granted. *Zeigler vs. Scott, Administrator.* 10 Ga..... 384
42. If a Jury give insufficient damages, it is sometimes a good ground for granting a new trial. *Newson vs. Harris, Dudley.*..... 180

IV. NEWLY DISCOVERED EVIDENCE.

1. Newly discovered evidence is a ground for a new trial, but it must be such as is so material, that it would be likely to change the verdict, or such as to show that justice had not been done; and it must be such as the movant could not have obtained by diligent inquiry. *Glover vs. Mosely & Co. Dudley.*..... 85
2. The discovery of new and material testimony after verdict, is a good ground for a new trial. *Stewart vs. Grimes et al. Dudley.*..... 209
3. A new trial will not be granted upon the discovery of new testimony which is merely cumulative. Though this rule has not been inflexible, the Courts will observe great caution in relaxing it. *Irwin vs. Morell. Dudley.*..... 74
4. The Court reluctantly granted a new trial upon the ground of newly discovered testimony which was not merely cumulative, in connection with certain auxiliary circumstances attendant upon the case, it not having been satisfactorily shown that due diligence was used to obtain it. *Ibid.*
5. A new trial will not be granted upon the ground of newly discovered evidence, unless due diligence has been used to procure it on trial, nor will a new trial be granted if the newly discovered testimony is merely cumulative. *Roberts vs. The State. 3 Kelly.*..... 322
6. Motions for new trials on new matter brought before the Court, should be received with great caution. *Monroe vs. The State. 5 Ga.*..... 85
7. A new trial will not be granted on the ground of newly discovered evidence, unless it be competent and material to the issue, and would probably produce a different result if offered, especially where it is merely cumulative, and in corroboration of testimony offered on the former trial. *Giles vs. The State. 6 Ga.*..... 276
8. Where the party comes to the knowledge of newly discovered evidence, through the information of others, the affidavit of the informant should be produced. *Ibid.*

9. A new trial will not be granted on the ground of newly discovered evidence, when the party making the application might, by the exercise of due diligence, have procured it before the trial. *Beard and another vs. Simmons*. 9 Ga..... 4
10. Nor will a new trial be granted on the ground of newly discovered evidence, merely to give the party an opportunity to *impeach* the credit of a witness sworn on the trial. *Ibid*.
11. A new trial granted on the ground of newly discovered evidence. *Thompson vs. The Central Bank*. 9 Ga..... 413
12. Applications for new trials are not favored by the Courts. *Berry vs. The State of Georgia*. 10 Ga 511
13. It is pretty generally agreed that it is incumbent on a party who asks for a new trial on the ground of newly discovered evidence, to satisfy the Court, 1st, that the evidence has come to his knowledge since the trial; 2d, that it was not owing to the want of due diligence that he did not acquire it sooner; 3d, that it is so material that it would probably produce a different verdict; 4th, that it is not cumulative only, viz: speaking to facts in relation to which there was evidence on the trial; 5th, the affidavit of the witness himself should be procured or its absence accounted for; and 6th, the new trial will not be granted, if the only effect of the evidence will be to impeach the credit of a witness. *Ibid*.

V. MISDIRECTION OF THE COURT: ADMISSION OR EXCLUSION OF EVIDENCE.

1. Where illegal evidence was admitted to the Jury, a new trial was granted. *Adm'r of Straffin vs. Newell*. T. U. P. Charl..... 172
2. Where the Jury, acting under the charge of the Judge, base their verdict upon a point not in issue, a new trial will be granted. *Crane vs. Bulloch*. R. M. Charl 318
3. *Secus*, if substantial justice has been done. *Ibid* See, also, *Wylly vs. King*. Ga. Dec. part II..... 7
4. Admitting an incompetent witness is no ground for a new trial, where all the facts proved by him are proved by others. *Morris vs. Foote*. Ga. Dec. part II 119
6. A new trial will be granted for misdirection of the Court, in matter of law material to the issue. *Baker vs. Ezzard & Cone*. Ga. Dec. part II..... 112

6. *Secus*, on a point immaterial. *Ibid.*..... 205
7. The Supreme Court will not send a cause back for a re-hearing, because of the admission of illegal testimony, if wholly irrespective of that testimony there was plainly and obviously proof sufficient to justify the finding. *Stephens et al. vs. Crawford, Gov.* 1 *Kelly*..... 580
8. It is error in the Court, and a new trial will be granted for misdirection, if the style of the charge is such as to mislead the Jury in mistaking it for direction in point of law, instead of the mere expression of opinion of the Court upon the facts. *Stell, Guardian, vs. Glass.* 1 *Kelly*, 486. See, also, *Taylor vs. Tucker.* 1 *Kelly*..... 235
9. The Court has the power to express to the Jury, its opinion upon the facts, but to its exercise there are assignable limits, and, in a doubtful case, this infringement upon the peculiar province of the Jury would constitute sufficient ground for a new trial. *Beall vs. Mann.* 5 *Ga.* 456
10. A verdict manifestly in accordance with the weight of the evidence and the justice of the case, will not be disturbed on account of the misdirection of the Judge; but where material testimony has been excluded, erroneous instructions given by the Judge, and the proof misstated in summing up the evidence, a new trial will be granted. *Potts vs. House, Ex'r.* 6 *Ga.*..... 324
11. Where the Court gives to the Jury, substantially, the charge as requested, and fairly submits the law arising upon the facts of the case to the Jury, a new trial will not be granted. *Berry et al. vs. Matthews et al.* 7 *Ga.*..... 457
12. When the Court charges the law correctly, although prefaced by preliminary remarks not affecting the merits of the controversy between the parties, a new trial will not be granted. *The Mayor, &c. vs. Goetchius.* 7 *Ga.*..... 139
13. Where the Court charges the Jury that it is "*not a little surprised that there should be an attempt made to acquit the defendant,*" who was indicted for an assault and battery; but at the same time instructed them that it was their duty to acquit or convict, according to the evidence, under the definition of the offence: *Held*, that although the first part of the charge was clearly objectionable, yet, taking the whole together, there was not such error in law, as would authorize a reversal of the judgment, and the granting of a new trial. *Keaton vs. The State.* 7 *Ga.*..... 189
14. The admission of illegal testimony on the trial, not objected to at the time, is no ground for a new trial. *Bond vs. Baldwin.* 9 *Ga.* 9. See, also, *Bishop vs. The State.* 9 *Ga.*..... 121

15. Where the law has been fully and fairly submitted to the Jury by the Judge in his summing up, and the Court is satisfied that the verdict is in accordance with the law and justice of the case, a new trial will not be awarded on account of some inaccuracy of language, as to the rights of the parties, which may have been used by the Judge, during the progress of the trial. *Carter and Wife vs. Buchanan.* 9 Ga. 539
16. The admission of illegal testimony is not sufficient to authorize a rehearing, when the verdict could not have been affected by it. *Ellis vs. The Lessee of Smith.* 10 Ga. 253
17. A new trial will not be granted for the admission of illegal evidence, if such evidence was immaterial, and its rejection could not have changed the result of the verdict. *Lee vs. Baldwin.* 10 Ga. 209
18. In ordinary cases, notwithstanding a misdirection, if the Court see that justice has been done, and that a new trial ought to produce the same result, the verdict will not be disturbed. *Arrington vs. Cherry.* 10 Ga. 429

See *Charge of the Court.*

VI. SURPRISE AND OTHER GROUNDS.

1. Where an Inferior Court whose jurisdiction is limited to a particular amount, allowed a defendant to plead a set-off that exceeded such amount, on motion, a new trial will be granted. *Reed vs. Cornich. Dudley* 20
2. A motion for a new trial, on the ground of surprise, will not be sustained where, by the exercise of proper diligence, such surprise might have been guarded against. *Sheftall vs. Clay. R. M. Charl.* 7
3. After conviction, the prisoner moved for a new trial, producing the affidavit of the prosecutor, that he had sworn falsely on the trial, and that the prisoner never stabbed him. But it appearing to the Court that the prosecutor had been drinking liquor, and that his mind was clouded thereby when he made the affidavit; that it was not read over to him, he saying he knew the contents; and that the prosecutor made the affidavit with the intention of immediately leaving the State: *Held*, that the motion for a new trial be refused, there being strong ground to suspect that the prosecutor was tampered with, especially as his testimony, on the trial, was corroborated by two disinterested witnesses. *State vs. Henley. R. M. Charl.* 505
4. A party is not entitled to a new trial on the ground of *surprise*, in the absence of a material witness, when no diligence has been used to

procure his attendance, even though his absence were procured by the improper conduct of the other party. *Carey, Assignee, vs. King and Hooper.* 5 Ga..... 73

5. A new trial will be granted for disingenuous attempts, on the part of the prevailing party, to stifle or suppress evidence, or to thwart the proceedings, or to obtain an unconscionable advantage—as where, by letters and persuasions, a witness is induced to absent himself from the town in which he lived, on the day on which the cause was set down for trial, in order to deprive the other party of material testimony. *Ibid.*

6. If a paper not in evidence be delivered to the Jury by design, by the party in whose favor the verdict is returned, the verdict will be set aside, even if the paper be immaterial. *Killen vs. Sistrunk and Wife.* 7 Ga..... 283

7. And where a paper, which is capable of influencing the Jury on the side of the prevailing party, goes to the Jury by accident, and is read by them, the verdict will be set aside, although the Jury may think that they were not influenced by such paper; *aliter*, where the paper is not read. *Ibid.*

8. It is irregular and improper for the Judge to converse with a Juror, respecting the case, after the Jury have been charged with the cause; and manifestly wrong to send to the Jury a *material paper not in evidence*, without the consent and against the protest of the party against whom it is to operate. *The Ruckersville Bank et al. vs. Hemphill et al.* 7 Ga..... 396

9. Where, on the trial of a cause, a witness, from mistake, failed to prove a necessary fact, to make out the defence, the witness having previously assured the defendant he could and would do so, whereby the defendant was prevented from procuring other testimony to prove the same fact, which could have been procured, and a recovery was had in consequence of such mistake of the witness and the party: *Held*, that such mistake operated as a surprise on the defendant, and that a new trial should be granted, the defendant having shown upon the record, a good and legal ground of defence to the action. *Wilson vs. Brandon & Shannon.* 8 Ga..... 136

10. Where, in the progress of a trial, the cause suffers injustice from the *honest mistake* of the party or his counsel, in omitting to offer in evidence the account book of one of the parties, which had already been made competent by the necessary proof, a new trial will be granted. *Rolfe vs. Rolfe.* 10 Ga..... 143

11. But the Court will not relieve the party from the consequences of mere *ignorance, inadvertence* or *neglect*, by granting a new trial. *Ibid.*

NOLLE PROSEQUI. See *Criminal Law, III.*

NON COMPOS. See *Insanity.*

NON-SUIT.

1. A judgment of non-suit will not be reversed, because directed by the Court, without the assent of the party. *Biggers vs. Pace.* 5 Ga..... 171
 2. A motion for non-suit will be overruled, where the Jury might have inferred facts from the evidence, which would support the action. *Ibid.*
 3. A writ of error does not lie from a voluntary *non-suit.* *Mott vs. Hill, Adm'r,* 7 Ga. 79. *Kent vs. Hunter.* 9 Ga..... 207
- See *Amendment, II. a. 10.*

NOTARY PUBLIC.

1. The certificate of a Notary Public, is *prima facie* evidence of the *non-payment* of the note, and of the *notice* also, under the Statute of Georgia, when so stated therein. *Walker et al. vs. The Bank of Augusta.* 3 Kelly..... 492
 2. The statement of the Notary, in his certificate, that he has deposited in the post-office notices addressed to the indorsers, at their respective places of abode: *Held*, to be *prima facie*, sufficient to make out the case of the plaintiff against the indorser, without stating the particular place to which the notices were addressed. *Ibid.* See, also, *Field vs. Thornton.* 1 Kelly..... 310
- See *Evidence, IV. 7.*

NOTICE AND DEMAND.

1. A corporation can inflict no punishment, nor proceed against any person, without notice to him to prepare for his defence. *State vs. Corporation Savannah. T. U. P. Charl.*..... 236
2. Where a party brings trover for a bond, it is not necessary to give the adverse party notice to produce it, before proving its contents. *Bank of So. Ca. vs. Brown. Dudley* 63
3. The drawer of a banker's check, is not entitled to notice of its dishonor, in a suit against him by the holder. *Daniels vs. Kyle & Barnett. 1 Kelly.*..... 305
4. An indorser is entitled to such notice. *Ibid.*
5. A notarial certificate, which states that a draft was presented at maturity, and payment demanded and refused for want of funds, and that due notice of the non-payment was given, on the same day, to all the parties concerned, is sufficient notice of the dishonor thereof. *Field vs. Thornton. 1 Kelly, 310. See, also, 3 Kelly.*..... 494
6. No particular form of notice is necessary; it will be deemed sufficient if it put the party on his guard, to be affected by it. *Ibid.*
7. In a suit by the Central Bank, no proof of notice, demand or protest is necessary, under its charter, to charge the indorser. *Merchant's Bank vs. Central Bank. 1 Kelly, 432. See, also, Central Bank vs. Whitfield. 1 Kelly.*..... 594
8. And this is true of notes payable elsewhere, sued on by the bank, as well as notes payable at that bank. *McDougald vs. The Central Bank. 3 Kelly.*..... 191
9. But where the holder of an indorsed paper fails to give notice of its dishonor, and the indorser is released in law, and the holder then transfers it to the Central Bank; although, on the trial, the bank is not bound to prove notice, demand or protest, yet, the indorser would be let into his defence, and would be permitted to show, by proof, his discharge for want of notice. *Merchant's Bank vs. Central Bank. 1 Kelly* 432
10. When a note is transferred, before due, as collateral security, the holder, without notice, is not subject to the equities between the maker and payee. *Gibson et al. vs. Conner. 3 Kelly.*..... 48

11. Where a purchaser of land, *without notice* of any fraud or defect in the title, purchases from one affected *with notice*, the former will be protected. So, where a purchaser *with notice*, purchases from one *without notice*, the former will be protected; otherwise, a *bona fide* purchaser might be deprived of the benefit of selling his property for its full value. *Truluck et al. vs. Peoples et al.* 3 Kelly, 448. See, also, *Herndon vs. Lessee of Kimball.* 7 Ga..... 432
12. Notice is not *indispensably* necessary to be given of a motion to the Court, to establish copies of office papers alleged to be lost or destroyed. *Saunders vs. Smith.* 3 Kelly..... 127
13. It is not necessary to give notice of the first suit, in order to recover over against the surety or other party ultimately liable; *with notice* the former judgment is conclusive: *without it*, *prima facie* evidence only of liability. *Napier vs. Neal.* 3 Kelly..... 301
14. It is proper for the loser of a bill or note, to give immediate notice to the parties on it, and to the public, of its loss; but public notice, not brought home to the buyer, will not affect his title; nor will the failure to give public notice preclude the loser from showing that the buyer took the bill or note *mala fide*. *Matthews vs. Poythress.* 4 Ga. 288
15. To sustain a voluntary conveyance against a subsequent *bona fide* purchaser for valuable consideration, the notice must be *actual*; and the registration of the conveyance is not such notice as will deprive him of the benefit of the Statute 27th Elizabeth. *Fleming vs. Townsend.* 6 Ga..... 103
16. In an action on a forthcoming bond, conditioned to deliver property to the Sheriff at the time and place of sale, *when required* by him: *Held*, that it was unnecessary to prove a *personal demand*—the advertisement being a sufficient notice to the party. *Thompson vs. Mapp.* 6 Ga..... 260
17. The assignee of a promissory note not negotiable, takes it subject to all the equities which existed between the assignor and maker thereof, at the time of the assignment, and all equities which may attach in favor of the maker before notice of the assignment. *Guerry vs. Perryman.* 6 Ga..... 119
18. Where, by a decree of a Court of Equity, a specific sum of money was decreed to be due to the maker of an *unnegotiable* promissory note, by the payee thereof: *Held*, that such decree could not be impeached by extrinsic evidence, so as to impair or defeat the equitable right of such maker, to set off such decree for the *full amount* thereof, against such note in the hands of an assignee, for a valuable consideration, but who had never given any notice to the maker of the note, of such assignment. *Ibid.*

19. The alienee of the person who erected the nuisance, is liable for its continuance, but only on request to abate it. *Bonner vs. Wellborn*. 7 Ga..... 296
20. In an action by the alienee of the person first injured by the nuisance, against the person who first erected it, it is not necessary to prove a request to abate it. *Ibid*.
21. To hear reports about an incumbrance upon land, which the purchaser is about to buy, does not amount to notice, nor is report or rumor a badge of fraud. *Colquitt vs. Thomas et al.* 8 Ga..... 258
22. Where a demand is a condition precedent to liability, it must be specially averred in the declaration, with time and place, and by whom and on whom made. *Montgomery, Adm'r, vs. Evans.* 8 Ga..... 178
23. In a suit brought upon an instrument in these words—"For value received, I promise to pay Gideon Hotchkiss five hundred dollars in castings, at Hopkins' & Hardeman's foundry in Augusta—said Hotchkiss' present account to go in part payment—the castings to be taken at 6 cents per pound:" Held, that no time being fixed by the contract, for the delivery of the property, there must be a demand and refusal proven. *Hotchkiss vs. Newton, Ex'r.* 10 Ga..... 560

As to NOTICE TO PRODUCE PAPERS. See *Evidence, V.*

As to NOTICE OF PRIOR DEED OR MORTGAGE UNRECORDED. See *Deed, III.; Mortgage, II.*

As to NOTICE TO SUE. See *Promissory Notes.*

As to NOTICE TO INDORSERS, &c. See *Promissory Notes, II.*

As to NOTICE OF FRAUD TO PURCHASERS. See *Fraud, II.*

NUISANCE.

1. A house, in which a faro table is kept for the purpose of common gambling, is, *per se*, a nuisance; and it is not necessary, to constitute it such, that there should be proof of frequent frays and disturbances committed there. *State vs. Doon & Dimond. R. M. Charl.*..... 1

2. The City Council of Savannah, under authority of an Act of the Legislature, passes two several ordinances prohibiting the cultivation of

- rice within the corporate limits, and providing for the destruction of growing crops: *Held*, that these ordinances were good and valid, and binding upon the inhabitants, as *police* regulations, and that the City Council had power and authority to judge of, and declare the planting of rice within the corporate limits, to be injurious to the health of the City, and a public nuisance, and to abate the same. *Green vs. The Mayor, &c.* 6 *Ga* 1
3. A nuisance defined. *Bonner vs. Wellborn.* 7 *Ga.*..... 296
4. In an action on the case for damages done by a nuisance, it is only necessary for the plaintiff to prove possession of the property injured. *Ibid.*
5. The alienee of the person who erected the nuisance, is liable for its continuance, but only on request to abate it. *Ibid.*
6. In an action by the alienee of the person first injured by the nuisance, against the person who first erected it, it is not necessary to prove a request to abate it. *Ibid.*
7. In a matter of complaint against the Savannah & Ogeechee Canal Company, that they were guilty of a nuisance by obstructing the drainage of the low lands of the Springfield plantation, the City Council of Savannah determined that they were guilty of the nuisance, and that they be notified to remove it within a specified time, by constructing an additional culvert, and in default thereof, that the culvert be built by the City, and that the Company pay the cost of its construction: *Held*, that the resolution, as to the costs, is not a judgment by which the rights of the company are concluded, and that the City Council had power to pass such a resolution. *The Mayor, &c. Savannah vs. The Savannah & Ogeechee Canal Company.* 9 *Ga.*..... 281
8. A nuisance is anything that worketh hurt, inconvenience or damage to another; as if one does an act, in itself *lawful*, which, being done in a *particular place*, necessarily tends to the damage of another's property. *Coker vs. Birge.* 9 *Ga.*..... 425
9. Where B. was about to erect a livery stable with a plank floor, upon a public street in a City, on his own land, within sixty-five feet of a public hotel, owned and kept by C.; and C. having applied for an injunction, alleging that the erection of the stable would cause irreparable injury to his property in said hotel, and result in the loss of health and comfort to himself and family, and in the loss of patronage to his hotel, in consequence of the unhealthy effluvia that would arise from the stable, the collection of swarms of flies, and the interminable stamping of horses therein: *Held*, that this would operate as a *nuisance* to complainant, and that he was entitled to the injunction. *Ibid.*

10. A livery stable in a City, erected within sixty-five feet of a hotel is, *prima facie*, a nuisance, and may be restrained by injunction. *Coker vs. Birge*. 10 Ga 336
 11. The answer of the defendant, admitting the facts charged in the bill, as to the distance and relative situation of the stable from the tavern, but denying that the livery stable is a nuisance, is mere matter of opinion, and not sufficient to authorize the dissolution of the injunction, before the final hearing. *Ibid.*
 12. Nor will the Court discharge the *ad interim* interdict, so far as to permit the experiment to be made, whether a livery stable could be erected and conducted in such a manner as not to be a nuisance. *Ibid.*
- OATH. See *Affidavit*.

OFFICE AND OFFICERS.

1. Judicial officers are not liable to civil suits for their judicial acts. *Upshaw vs. Oliver et al. Dudley*..... 241
2. The Legislature have power to destroy all offices, (except those held by constitutional officers,) which are made for civil government, and thus to put an end to the functions of the incumbents, before their term of office shall have expired. *State vs. Mayor, &c. Savannah. R. M. Charl.* 250. See, also, *State vs. Dews. R. M. Charl.*..... 397
3. If a corporation be dissolved or surrendered, the offices under it share its fate. *Ibid.*
4. If a Statute destroys the character in which persons have acted in a civil or public trust, without pointing out a new mode in which the trust is to be performed, the latter also is at an end. *Ibid.*
5. Persons acting publicly, as the officers of a corporation, will be presumed rightfully in office, and their official acts will be binding on the corporation, so far as third persons are concerned. *Hull et al. vs. Carey, Assignee.* 5 Ga..... 239

See *County Officers*. See, also, *Respective Titles of Clerks, Sheriffs, &c. &c.*

OVERSEER. See *Principal and Agent*, II. 11.

PARDON.

1. So far as the public is interested in a fine imposed, the Executive remission has the effect to restore it to the individual fined, although it has been paid over to the Attorney or Solicitor General, and by him to the County Treasurer, before the Executive pardon was granted. *In the matter of the Attorney General.* 1 *Kelly*..... 607

PARENT AND CHILD.

1. The father has the legal right to the custody of his children ; but Courts of Justice may control this right, when the safety or interests of the child imperiously require it. *In the matter of Mitchell. R. M. Charl* 489

See farther, *Title "Habeas Corpus."*

PAROL EVIDENCE. See *Evidence, V.*

PAROL LICENSE. See *Partition, 1.*

PAROL TRUST IN LAND. See *Equity, I. f.*

PARTIES. See *Pleading, II.*

PARTITION.

1. A and B were joint tenants of a lot of land. No partition had ever been made between them. It was understood, however, that A should have the east, and B the west end of the tract. B agreed that A might erect a mill on his (A's) half, and cut as much timber on the west half, and overflow as much of the land as might be necessary for that purpose. Afterwards, B sold to C, the latter having agreed expressly with A to abide by these stipulations, which B exacted of him before he could consent to sell. After the dam was partly constructed, and timbers collected, for building the mill, C sold to D, who shortly thereafter notified A to discontinue the work ; and upon his refusal,

brought his action of trespass for the overflowing of his land by the back water: *Held*, that under these circumstances the action could not be maintained, and that the original parol agreement could not be revoked after it had been executed at the defendant's expense. *Sheffield et al. vs. Collier.* 3 *Kelly*..... 85

2. Although Courts of Equity have concurrent jurisdiction with Courts of Law, in cases of partition, as a general proposition, yet, in this State, if the party has an ample and adequate remedy, according to the provisions of our Statute, a Court of Equity will not assume jurisdiction. But when it appears from the case made, that there is any obstacle in the way, so as to render the remedy at Law less ample and adequate, a Court of Equity will maintain its jurisdiction, to remove such obstacle, and grant adequate relief. *Bogg's Adm'r, &c. vs. Chambers et al.* 9 *Ga.*..... 1

PARTNERS AND PARTNERSHIPS.

I. GENERAL PRINCIPLES.

II. POWERS AND LIABILITIES OF EACH PARTNER.

III. PARTNERSHIP PROPERTY AND RIGHTS OF CREDITORS.

IV. DISSOLUTION: AND HEREIN OF DEATH OF PARTNER AND SURVIVING PARTNER.

I. GENERAL PRINCIPLES.

1. The Courts will not recognize a partnership in crime. *Bank of Ga. vs. Clark.* *Dudley*..... 83
2. As a general rule, one partner cannot sue another at Common Law. *Miller vs. Thorn.* *R. M. Charl*..... 180
3. If one of two parties plaintiff, being partners in trade, take the benefit of the Insolvent Laws, and return on his schedule a debt due by judgment to the firm, and no trustee is appointed in terms of the law, to take charge of the assets returned, no process can be issued for the collection of the judgment. *The State vs. Luckie.* *Ga. Dec. part I.* 69
4. Payment of a partnership note by a third person, for one of the firm, is such a payment as to prevent such third person from recovering it against the firm. *Childress vs. Stone & Guyton.* *Ga. Dec. part II.*.... 157

5. Where two or more persons enter into an agreement to purchase cotton jointly; to advance equal portions of the purchase money; to pay equal portions of the expense of transportation of the same, and to share in the loss and profits, it is, in judgment of law, a co-partnership for a single adventure. *Solomon vs. Solomon, Ex'r.* 2 *Kelly*..... 26
6. Partners, as *between themselves*, may alter, modify, or partially dissolve the co-partnership contract, provided they do not violate any principle of law or public policy. *Ibid.*
7. The Act of 1820, to regulate the mode of prosecuting actions against joint contractors and co-partners, applies as well to joint and several contractors, as to joint contractors only, provided they are sued together in the same action. *Tedlie vs. Dill.* 2 *Kelly*..... 130
8. The holder of a promissory note is bound to sue a *dormant* partner of the makers, not generally known as such, when notified to do so by the surety or indorser. *Howard vs. Brown, Ex'r.* 3 *Kelly*..... 523
9. A bill filed for a general account and settlement of a partnership, may embrace every object necessary to the final and complete adjustment of the concern, without being demurrable for multifariousness. *Wells and others vs. Strange.* 5 *Ga.* 22. See, also, *Warthen vs. Brantley & Daniel.* 5 *Ga.*..... 574
10. Upon an agreement between A and B, that A should take certain negroes of B, and work them in a blacksmith shop, furnish all supplies, pay all expenses, and give B one-half of the nett proceeds of the shop for the use of the negroes: *Held*, that as to third persons, A and B are partners. *Buckner vs. Lee et al.* 8 *Ga.*..... 285
11. If the business of a firm is conducted by one of the partners, and his name is the name of the firm, and a note is made by that partner in his name, the firm is liable thereon, if it is proven that the note was made as a note binding the firm, or that the consideration of the note was for the benefit and in the course of business of the firm, and that the payee believed these things, and the maker sanctioned his belief by his acts and representations. *Ibid.*
12. If money is borrowed, or a purchase made by an individual member of a partnership, and his note is given therefor, it is, *prima facie*, the debt of the individual; but the holder, in an action against the firm for the consideration of the note, may rebut this presumption by proof, and if it appear that the credit was given to the firm, and not the individual, if the money or the property went to the use and in the course of business of the firm, it will be liable. If, however, the credit was given to the individual, the firm will not be liable, although the money or property went to the use, or in the course of business of

the firm. In that case, it will be held as an advancement by the member to the firm, and he will become a creditor of the firm. *Ibid.*

II. POWERS AND LIABILITIES OF EACH PARTNER.

1. While, as a general proposition, one partner cannot bind another by deed, yet, in regular course of business, as in case of a *charter party*, he may. *Adm'r of Straffin vs. Newell. T. U. P. Charl.*..... 163
2. After dissolution of co-partnership, and until the Statute of Limitations shall have attached to the demand, each partner has the power to bind his co-partner by promises which shall avoid the Statute. *Fellows vs. Guimarin et al. Dudley.*..... 101
3. The authority of one partner to make contracts which bind the whole, arises from the confidential nature of the partnership relation. *Brewster et al. vs. Hardeman et al. Dudley.*..... 139
4. After the dissolution, one partner cannot, by a new promise, revive against his co-partners a debt from which all have once been legally absolved; and therefore, an acknowledgment of a debt or promise to pay it, made by one partner *after* dissolution, and *after* the bar of the Statute has attached, does not revive the debt against his co-partners. *Ibid.*
5. But "upon precedent and authority," the promise to pay by one partner, *after* dissolution and *before* the bar of the Statute has attached, will be binding on the other partners. *Ibid.*
6. After dissolution, one partner cannot, by his separate acknowledgment, convert an open account into a liquidated demand, so as to charge his former partners with interest. *Ibid.*
7. If one of two partners take the benefit of the Insolvent Laws, the other partner has no authority to collect such of the debts of the firm as are placed on the insolvent's schedule. *State vs. Luckie. Ga. Dec. part I.*..... 69
8. One partner cannot bind the firm by deed. *Donaldson vs. Kendall et al. Ga. Dec. part II.*..... 227
9. When one partner fraudulently misapplies any portion of the partnership funds to his own private use, without the knowledge or consent of the other partners, he will be held liable for the same, with interest thereon from the time of such misapplication, to the other partners. *Solomon vs. Solomon, Ex'r. 2 Kelly.*..... 26

10. Where, however, one partner drew \$3,500 of the joint funds of the partnership, with the *express assent* of his co-partner, it was *Held*, that he was not liable for interest thereon, until a demand was made upon him to account therefor, by his co-partner, and refused, he being considered in *default* only from such refusal. *Ibid.*
11. The admissions of one member of a firm, who is not a party to the suit, when the Court *is satisfied that the partnership has been established*, may be given in evidence to charge the other members, but not otherwise. *McCutchin vs. Bankston.* 2 *Kelly* 245
12. After a dissolution, one partner cannot bind his co-partner by a new contract, as an indorsement, even though it be for a debt due by the partners before dissolution. *Humphries vs. Chastain.* 5 *Ga.* 166
13. In order to sue out an attachment in behalf of a firm, one partner has the right to execute a bond in the name of the firm. *Lessee of Wilson and another vs. Smith & Co.* 8 *Ga.* 551
14. The answer of one partner to a bill in Equity, containing admissions against the interest of the partnership, although not filed as an answer in the case, may be read in evidence as a written admission, on due proof of its execution. *Dennis et al. vs. Ray, Receiver.* 9 *Ga.* 449

III. PARTNERSHIP PROPERTY: RIGHTS OF CREDITORS.

1. A creditor who has obtained judgment against one partner, in his individual capacity, anterior to the partnership, may levy on the partnership effects and sell his debtor's interest therein, without reference to the claims of the creditors of the firm. *Ex parte Stebbins & Mason. R. M. Charl.* 77
2. If one of two partners takes the benefit of the Insolvent Law, the other partner has no authority to collect such of the debts of the firm as are placed on the insolvent schedule. *State vs. Luckie. Ga. Dec. part II.* 89
3. If A holds a demand against B & C as partners, and C is dead, and there are effects of the firm in the hands of B, the surviving partner, sufficient to pay the debt, and D holds property conveyed to him by C, to indemnify him as surety for C; *upon the equities subsisting between B and C*, Chancery will compel A to proceed against the property in the hands of B, the surviving partner, so as to leave the property conveyed to D to be applied to his remuneration as surety for C. *Newsom et al. vs. McLendon et al.* 6 *Ga.* 392
4. An attachment cannot issue, ordinarily, for a partnership debt, against

- one of the partners individually, and be levied on the partnership property, on the ground of the non-residence of the defendant: *Secus*, if the non-resident were the only survivor of the firm. *Wiley & Co. vs. Sledge*. 8 Ga..... 332
5. Where goods have been purchased in the name of, and on the credit of one co-partnership firm, and turned over to another co-partnership firm, composed of some of the same individuals, without any *bona fide* or *valuable* consideration being paid therefor: *Held*, that the Court of Equity will aid the judgment creditors of the co-partnership making such transfer, to follow the goods into the hands of the transferees, and require them to account for such goods, or the proceeds of the sale thereof, and apply the same in satisfaction of their judgments. *Dennis et al. vs. Ray, Receiver*. 9 Ga..... 449
6. The rule, that the joint estate is to discharge the joint debts in the first place, and the separate estate the separate debts, and that neither can invade the funds of the other until that particular class of debts is satisfied out of it, considered and *questioned*. *Cleghorn vs. The Ins. Bank of Columbus*. 9 Ga..... 319
7. Even admitting the rule as a principle of general equity, it will not be enforced to the exclusion or postponement of the joint creditors, so long as they have recourse *at Law* against the separate estate. *Ibid*.
8. It is only when the legal recourse of the joint creditors against the separate estate is terminated, and they have no claim against those assets, except in Equity, (as in case of death, bankruptcy, or perhaps statutory assignment in insolvency of a partner,) that the joint creditors are postponed. *Ibid*.

IV. DISSOLUTION: AND HEREIN OF DEATH OF PARTNER AND SURVIVING PARTNER.

1. When a partnership relation ceases, the authority which grows out of it, and is dependent upon it, also terminates; except so far as a continuing authority touching the unsettled business of the firm, is expressly delegated or necessarily implied for the benefit of all parties. *Brewster et al. vs. Hardeman et al. Dudley*..... 139
2. After the dissolution of a partnership, one partner cannot by a new promise, revive against his copartners a debt, from the obligation of which they have all once been relieved; and, therefore, a promise to pay a debt, *after* a dissolution, and *after* the bar of the Statute has attached, binds none but the partner making it. *Ibid*.

3. But according to "precedent and authority," if the promise, although

after dissolution, be made before the bar of the Statute has attached, the other partners will be bound thereby. *Ibid.*

4. After dissolution, one partner cannot convert an open account, by his individual acknowledgment, into a liquidated demand against his former partners. *Ibid.*
5. S was a partner with M, under the firm of M. & S.; and with T, under the style of S. & T. After the death of S, M, as the surviving partner of M. & S. sued T, as the surviving partner of S. & T. at Common Law, upon transactions which had been held between the two firms in the life time of S: *Held*, that such action would not be maintained. *Miller vs. Thorn. R. M. Charl.*..... 180
6. A warrant of attorney to carry on a suit, was given to L. & M. attorneys at law and co-partners; judgment was obtained thereon, and after the death of L, *sci. fa.* was issued against the bail by M & N. who had entered into co-partnership: *Held*, that the latter firm had authority to prosecute such process, under the warrant of attorney. *Nichols et al. vs. Dennis et al. R. M. Charl.*..... 188
7. If, on the dissolution of a firm, power be given to one partner to collect the debts thereof, such partner may execute a warrant of attorney for self and partners, for the purpose of authorizing a third person to collect the same. *Ibid.*
8. Upon the death of one member of a firm, the representatives of deceased partner become tenants in common with the survivor, and are entitled to an account. *Shad vs. Fuller. R. M. Char.*..... 501
9. But the survivor is alone responsible *at Law* for the joint debts, and therefore, the right of possession and disposition of the joint effects remains with him. *Ibid.*
10. An injunction will not be granted at the instance of representatives of deceased partner, to restrain the survivor from selling joint effects at public sale, where there is no charge of fraud, misconduct or insolvency, and no proof that the account has been withheld for an unreasonable time. *Ibid.*
11. There can be no objection to a *public* sale made of the joint effects at a public time and place. *Ibid.*
12. A surviving partner is entitled to the control of the partnership effects, for the payment of debts, and for the residue he is responsible, not to the widow and children of the deceased partner with whom there is no privity, but to the executor or administrator, who alone can demand his part of the partnership effects, after the payment of debts. *Administrator of Spann vs. Executor of Fox. Ga. Dec. part I.*..... 1

13. A surviving partner is liable to the representative of a deceased partner, for a moiety of the profits of the partnership effects used in trade; or if he employs them and makes interest, for the interest on his own share, deducting necessary expenses. *Ibid.*
 14. The executor of a deceased partner cannot be sued at Law for a partnership debt. *Roosevelt & Baker vs. McDowell, Ex'r* 1 *Kelly*... 493
 15. The surviving co-partner is alone liable to be sued at Law for the firm debts. *Ibid.*
 16. Partners, as *between themselves*, may alter, modify, or partially dissolve the co-partnership contract: provided, they do not violate any principle of law or public policy. *Solomon vs. Solomon, Ex'r.* 2 *Kelly*, 206
 17. After a dissolution, one partner cannot bind his co-partner by a new contract, as an indorsement, even though it be for a debt due by the partners before dissolution. *Humphries vs. Chastain.* 5 *Ga.*..... 166
- PATROLS. See *Pleading IV.* 23.

PAYMENTS.

I. GENERALLY.

II. APPLICATION OF PAYMENTS.

I. GENERALLY.

1. A payment to a person who has no power to receive, becomes valid by a subsequent ratification by the creditor. *Dews vs. Pickard.* *R. M. Char.*..... 479
2. But where the creditor does not ratify the act of an individual receiving money for him without authority, but merely assents to receive the liability of a third person, for the payment of his debt due by his debtor, the latter will not be discharged, unless it be *expressly* agreed to run the risk of the solvency of the person who comes in aid of the debtor and to discharge the latter, or unless the creditor has thereby received payment of his debt, or has debarred himself from recovering by laches. *Ibid.*
3. *Thus*, where M, without any authority from the creditor, D, for his

own convenience entered into an arrangement with the debtor, P, (his partner,) by which M assumed the payment of the money due to D; but there was no agreement in relation to this settlement between P, the debtor, and D, the creditor, and the only evidence of assent shown on his part, was a charge made by him against M, of the amount of the due bill of P, in an account exhibited for the purpose of submitting all matters between them for arbitration: *Held*, that these facts did not constitute a legal payment of the debt from P to D. *Ibid*.

4. Payment of a partnership note by a third person for one of the firm, is such a payment as to prevent the third person from recovering it from the firm. *Childress vs. Stone & Guyton. Ga. Dec. part II.* 157
5. Where the surety to a contract pays it off, it is, in contemplation of law, a payment made *for the principal debtor*, and he may recover it in an action against the principal for so much money paid to his use. *Per* WARNER, J. in *Whitehead vs. Peck. 1 Kelly.....* 155
6. If parties think proper to treat property delivered in payment, and received as cash, they have a legal right to do so, and such payment, in judgment of law, will be considered as a cash payment. *Ibid*.
7. Payment of an execution to the plaintiff, by the collecting officer, without stipulating at the time, that it is to be kept open for his benefit, operates as a full discharge and satisfaction of the debt. *Arnett vs. Cloud et al. 2 Kelly.....* 55
8. So also, money paid upon an open execution in the hands of the Sheriff or his deputy, discharges the defendant. *Matthis vs. Pollard. 3 Kelly. 4*
9. In actions against agents, for money voluntarily paid by mistake in fact, the true distinction is, where the agent has paid the money over to his principal in good faith, he is not *personally* liable; but when he has not paid the money over, or before such payment, he has notice of the mistake, and is required not to pay it, then he is *personally* responsible, although payments to his principal may have been made. *Law vs. Nunn. 3 Kelly.....* 93
10. A promissory note, given with an express understanding, will operate as payment of a pre-existing debt. *Mims vs. McDowell. 4 Ga..* 182
11. If A gives his promissory note to B, in liquidation of the book debt of C, without other proof, it does not amount to payment of C's account. *Butts vs. Cuthbertson et al. 6 Ga.....* 166
12. One simple contract does not merge or extinguish another. *Wylly et al. vs. Collins & Co. 9 Ga.....* 223

13. A bill, acceptance, or promissory note, either of the debtor or third person, is not a payment or extinguishment of a debt, unless accepted as such. *Ibid.*
 14. The circumstance of the note or bill being given by an agent of the principal debtor, cannot vary the question. *Ibid.*
 15. If the written promise of the principal debtor does not discharge the debt, *a fortiori*, the note of the agent can have no higher efficacy. *Ibid.*
 16. A, the indorsee of a negotiable note given by B, placed the same in the hands of an attorney for collection; B, as collateral security for the payment of the note, placed in the hands of A's attorney a larger amount of notes and other evidences of debt against third persons, taking a receipt therefor from A's attorney, in which the attorney stipulates, as soon as he collected sufficient to pay the note of A, to deliver the same to B, and pay him any balance there might be remaining: *Held*, that this did not amount to a satisfaction of B's note, nor to an agreement not to sue, until the securities mentioned therein were collected. *Pennington vs. Watson et al. Dudley*..... 98
 17. Where a note, represented as good, is taken in payment of property, and it proves to be valueless, the party receiving it may tender it back and recover the price of the property. *Walker vs. Tatum. Ga. Dec. part II*..... 161
- See *Administrators and Executors, II. 2; Promissory Notes, I. 3.*

II. APPLICATION OF PAYMENTS.

1. Where neither debtor nor creditor has directed the application of the payment made, the Court is vested with the discretion to apply it according to the justice of the case. *Dews vs. Pickard. R. M. Charl.* 479
2. The general rule is, where there are distinct demands due by the debtor to the creditor, and a payment is made by the debtor, he has a right to direct its application; but if the debtor neglect to make a specific application of the payment at the time, then the right of application devolves on the creditor. *Rackley vs. Pearce. 1 Kelly*.... 242
3. A plaintiff having two executions in the hands of the Sheriff, which are liens on money arising from the sale of defendant's property, cannot apply the fund to the *younger*; but the law will appropriate it to the older. *Newton vs. Nunnally. 4 Ga.*..... 356

PERJURY. See *Criminal Law*.

PHYSICIANS.

1. Notes, bonds and other assumptions made to a person, as a physician or surgeon, the consideration of which is services rendered in prescribing for the cure of diseases, without a license: *Held*, to be null and void. So, also, every obligation which springs out of the exercise of the profession of medicine without a license. *Coyle vs. Campbell*. 10 Ga..... 570

See *Evidence*, IV. 42.

PILOTS AND PILOTAGE.

1. The 5th section of the Act of 1799, which vests the Commissioners of Pilotage with power to decide, adjust and regulate any damage, dispute, complaint or difference arising between or against master and pilot, for pilotage or any other matter relating to the business of a pilot, does not deprive the Justice's Court of jurisdiction over a demand for pilotage, where such demand does not exceed thirty dollars. *Taylor vs. Thomas*. *Dudley*..... 59
2. The neglect or refusal of a pilot to board a vessel, by which damage ensues to her, may be proceeded against, under the 5th section of the Act of 1799, if the *claim* for damage does not exceed \$100. *Com. of Pilotage vs. Lowe et al*. *R. M. Charl*..... 298
3. And the *claim*, and not the measure of damages assessed by the Commissioners, is the test of the jurisdiction. *Ibid*.
4. But the non-payment of the fine assessed under the 5th section, will not authorize the Commissioners to suspend the pilot from the exercise of his duties. *Ibid*.
5. The 7th section of the Act of 1799, directs that the license of a pilot shall be revoked by the Commissioners of Pilotage, "if he shall be found not sufficiently skilled, or shall become incapable of acting, or shall be negligent or misbehave in his duty towards the Commissioners:" *Held*, that the neglect of a pilot in not boarding a vessel when he ought to have done so, would authorize his suspension under this section. *Low vs. Com. of Pilotage*. *R. M. Charl*..... 302

6. And it is not necessary, to make the sentence of suspension legal, that a formal judgment should be entered up. *Ibid.*

7. The office of a pilot is not a public one; it is a private profession, trade or calling. *Ibid.*

PLANK ROADS. See *Rail Roads and Plank Roads.*

PLEADING.

- I. GENERAL PRINCIPLES.
- II. OF THE PARTIES.
- III. OF THE PETITION OR DECLARATION.
- IV. OF DEMURRERS, PLEAS AND ANSWERS.
- V. DEFECTS AND IRREGULARITIES CURED BY PLEADING OR VERDICT.

AS TO PLEADING IN CRIMINAL CASES, see *Criminal Law*.
AS TO PLEADING IN EQUITY, see *Equity*, III.
AS TO AMENDMENTS, see *Amendments*.

I. GENERAL PRINCIPLES.

1. Under our Judiciary system, a party may plead whatever he pleases, and in any shape or form he may think proper; but having pleaded, he will be confined, in his defence, to his pleas. *Fitzgerald vs. Gurvin et al. T. U. P. Charl.*..... 282
2. Where defendants were sued in assumpsit, as executors *de son tort*, and pleaded, *non assumpsit ne unques executor*, and that they never intermeddled, the Court would not allow a separate trial of each plea. *Brodnax vs. Brown et al, Ex'rs. Dudley*..... 202
3. When the proper pleadings have been dispensed with, by agreement between the parties, they may be entered at any time, *nunc pro tunc*, for the sake of the record. *Boog et al. vs. J. & J. Bayly. R. M. Charl.* 190
4. The 25th section of the original charter of the Central Bank of Georgia limited loans to any one person to \$2500. In a suit by the bank upon a renewal note, under the amended charter of 1829, or on a bill of exchange discounted or purchased under the Act of 1838, for the purpose of remitting funds to pay interest on the State's bonds or foreign debt, it is not necessary to set out these acts as *exceptions* to the

- limitation contained in the original charter, and to aver that the debt sued on was contracted under the powers which they confer. These Acts were passed to extend the original charter, by clothing the bank with additional authority, and the Courts are bound to observe these provisions. *Bond vs. The Central Bank.* 2 *Kelly*..... 101
5. Where the indictment alleges an offence to have been committed in the year 1846, the Court will presume it to be in the year of our Lord, 1846. *Hail vs. The State.* 3 *Kelly* 22
6. *Harman* for *Herman*, held not to be a misnomer. *Kalm vs. Herman.* 3 *Kelly*..... 269
7. After a demurrer has been argued and overruled, and the defendant has permitted the time for pleading to elapse, the Court may, in its discretion, refuse him leave, unless satisfied that it is necessary to attain justice, and that the application is not for delay or vexation. *Alexander, Adm'r, vs. Sutlive.* 3 *Kelly*..... 30
8. The English rule, that when a plaintiff demurs to a plea, the demurrer runs through the whole record, and it is the duty of the Court to give judgment against the party first in default, is not applicable to our Courts. *Wynn vs. Lee.* 5 *Ga* 217
9. In Georgia, upon a plea of the Statute of Limitations, and in all other cases, the plaintiff is entitled to prove new matter, in avoidance of the plea. *Henry vs Peters.* 5 *Ga*..... 311
10. The provision in the Judiciary Act of 1799, inhibiting defendants from denying any deed, bill, bond, single or penal note, draft, receipt or order, unless upon oath, applies to such instruments only, as are the foundation of the suit, and not to such as are *collaterally* introduced in evidence. *Williams vs. Rawlins.* 10 *Ga*..... 491
11. It is no error to refuse to charge the Jury as to a matter of pleading, that being an issue of law, determinable only by the Court. *Hotchkiss vs. Newson.* 10 *Ga*..... 560
12. General remarks respecting pleading. *Ibid.*
13. A rule against the Sheriff to pay over money, is not sufficiently certain, unless it state the Court in which the judgment and execution claiming the money was had. *Bethune vs. Bonner.* 2 *Kelly*..... 169

II. OF THE PARTIES.

1. An objection to an application for dower, on the ground of the want of proper parties, should be made in a motion to quash, or by plea in abatement; it is no ground for a new trial. *Fitzgerald vs. Garvin et al. T. U. P. Charl.*..... 283
2. The executor or administrator, and not the heir, is the proper party to be made defendant in foreclosure, in the event of the mortgagor's death before foreclosure. *Adm'rs of Magruder vs. Adm'rs of Offutt. Dudley* 227
3. And the rule is the same, both as to realty and personalty. *Ibid.*
4. The same person cannot be plaintiff and defendant in the same suit, at Common Law. *Miller vs. Thorn. R. M. Charl.*..... 180
5. As a general rule, it is true, that suits should be brought by the person having the legal interest in contracts; but in the case of negotiable notes, suits may be brought in the name of persons having no such interest. They may sue as trustee for the persons having the real interest. *Field vs. Thornton. 1 Kelly, 306. See also, Nisbet vs. Lawson. 1 Kelly*..... 284
6. The entry of "parties made" on the motion docket, is insufficient to make the representative of the deceased plaintiff or defendant a party. There must be a judgment rendered and entered on the minutes. *Bryant et al. vs. Owens and Wife. 1 Kelly*..... 367
7. Under the Judiciary Act of 1799, where both plaintiff and defendant die before *scire facias* had issued to make parties, the action does not abate, but parties may be made and the action proceed. *Executor of Henderson vs. Alexander's Administrator. 2 Kelly*..... 82
8. In a claim case pending in the name of A, for the use of B, administrator of D, B dies: *Held*, that the suit abated until the legal representative of D should be made a party. *Barker vs. Bethune and another. 3 Kelly*..... 160
9. Where letters testamentary were revoked under the Act of 1834, on account of the birth of a posthumous child, and an intestacy declared, neither by the Common or Statute Law of England, nor the Acts of our own Legislature, can the newly appointed administrator be made a party defendant to a suit pending against the removed executor. *Martin, Adm'rx, vs. Broach, Ex'r. 6 Ga.*..... 21

10. A party may use the name of another person as plaintiff in a suit, without his authority or consent, upon indemnifying him for costs, if the use of such person's name is necessary to the assertion of his legal rights. *Hargraves vs. Lewis.* 6 Ga..... 207
11. Where an action of trover is brought by trustees, in whom the legal title is vested, for the recovery of a negro, the allegation that they sue "for and in behalf of one of the *cestui que trust*," is surplusage, the trustees being the real parties. *Schly vs. Lyon and another, Trustees, &c.* 6 Ga..... 530
12. In an action by the vendor on a covenant made by the purchaser in the deed, the assignees of the purchaser cannot be joined with him as parties defendant. *Brooks vs. The Water Lot Co.* 7 Ga..... 101
13. The name of a party may be used as the lessee of the plaintiff in ejectment, even against his consent, where he is indemnified against costs: *Provided*, such use of his name is necessary and important to the assertion and successful prosecution of the rights of another party. *English vs. Doe ex dem. Register.* 7 Ga..... 387
14. The Justices of the Inferior Court are not the legal obligees of an administrator's bond, payable to the Justices, &c. *sitting as a Court of Ordinary*, so as to authorize them to maintain suit on such bond. *The Justices, &c. vs. Wooten et al.* 7 Ga..... 465
15. A previous warrantor of the title may be a co-defendant in an action of ejectment, provided he would be amenable in damages in case of eviction. *Redwine vs. Brown et al.*..... 311
16. On the application for dower, under the Act of 1824, the owner of the land is such a party in interest as the Statute contemplates, and should be notified of the intended application. *Chapman vs. Schroder.* 10 Ga..... 321

See *Abatement*.

III. OF THE PETITION OR DECLARATION.

1. A general declaration for goods, wares and merchandize, a bill of particulars is bad. *Martin vs. Administrator of Tyffe. Dudley*..... 17
2. And when the account sued on was a single item, charged in the books thus, "*Bills receivable to merchandize*," and a verdict had been rendered for plaintiff, the Court granted a new trial, declaring that the entry was too general to prove the sale and delivery of any particular goods;

and although the defendant had' waived the bill of parcels, plaintiff must prove the particular items. *Ibid.*

3. A count in tort cannot be joined with one in assumpsit. *Hitt and Dill vs. Lippitt. Ga. Dec. part II.*..... 89
4. Where assumpsit is the proper remedy, a *scienter* is not necessary to enable a party to recover for fraudulent representations. Hence, alleging fraud and *scienter* is mere surplusage, and will not make the count sound in *tort* so as to constitute a misjoinder with a previous money count. *Ibid.*
5. A declaration in attachment need not recite the previous proceedings, which are already part of the record. *Bell vs. Hobbs. Ga. Dec. part II.*..... 144
6. In assumpsit, all the facts being stated from which the law implies a promise, a formal allegation of a promise is not necessary. *Ibid.*
7. Different counts may be joined in *all* cases, where the *same judgment* can be rendered, and where different pleas are put in, provided the same judgment may be rendered on all the counts. *Mahaffey vs. Petty et al. 1 Kelly.*..... 264
8. There must be a *time* averred in the writ, when every material or traversable fact transpires. *Bond vs. The Central Bank. 2 Kelly.*.. 99
9. In a suit by the *bearer* against the maker of the note, the omission in the declaration to allege the time when the note was transferred, is cured by verdict or confession of judgment. *Ibid.*
10. No promise need be alleged in the declaration, when the facts set forth show a legal liability without it. *Ibid.*
11. A note given for rent of a *storehouse*, is described in the plaintiff's writ as given for *rent*, omitting the words *of storehouse*: *Held*, not to be a fatal variance under our Statute. *White et al. vs. Molyneux. 2 Kelly.*..... 126
12. A declaration with the common counts for money had and received, and for money paid, laid out and expended, without specification by bill of particulars, or otherwise, on what account specially it was received or paid out, is defective; but it is such a defect as is amendable, and being cured by a verdict, is not good in arrest. *Dill et al. vs. Jones. 3 Kelly.*..... 80
13. A count in trover, in the usual form, is not demurrable. The Statute of 1847, prescribing a form of declaration to recover personal proper-

- ty, is permissive only, and not compulsory. *The Mayor, &c. Columbus, vs. Howard.* 6 Ga..... 213
14. Where an action on a Sheriff's bond is brought for the purpose of recovering a sum of money found to be due to two jointly, on an order absolute against the Sheriff, it is no objection to the sufficiency of the breaches assigned, that the declaration does not state the amount of the interest of each in that sum. *Towns, Governor, vs. Hicks and Webb.* 6 Ga..... 235
15. In the sale of a slave, where there is a contract of warranty, the purchaser may consider the contract as a nullity, and bring his action on the case for deceit; and in such action it is not necessary that he should set forth the contract. *Dye vs. Wall.* 6 Ga..... 584
16. In suing on bank bills, it is not necessary to describe them by setting forth the numbers and letters. *Curey, Assignee, vs. Greene.* 7 Ga. 79
17. Declarations on attachments must be filed at the first term. *Birdsong & Sledge vs. Brooks.* 7 Ga..... 88
18. The consent rule in ejectment is always considered as filed, and admits lease, entry and ouster. *Hilliard vs. Doe ex dem. Connelly.* 7 Ga.... 172
18. The fictitious form of pleading in ejectment: *Held*, to be sufficient. *Ibid.*
20. The 3d section of the Act of 1847, entitled "an Act to simplify and, curtail pleadings at Law," does not include an agreement to pay certain specific articles. *Phillips vs. Dodge.* 8 Ga..... 51
21. A declaration on notes, payable in specific articles, held to be bad without an averment of the value of those articles at the maturity of the notes, and that the notes being offered in evidence were properly rejected, because of the variance between the allegation and the proof. *Ibid.*
22. At Common Law, after the cause has gone to the Jury, such a defect is not amendable. *Ibid.*
23. If the declaration allege a special contract for the rent of mills, to be paid in repairs, and it is proven on the trial, the plaintiff cannot recover on the common count for a *quantum meruit*, but will be held to the special contract, and the measure of damages is the value of the repairs agreed to be made, and the loss sustained by the failure to make them. *Baldwin vs. Lesseur.* 8 Ga..... 71
24. Where a request is a condition precedent to liability, it must be spe-

- cially averred in the declaration, with time and place, and by whom, and to whom made. It must be so set forth, as that the Court may judge whether it is made according to contract. *Montgomery, Adm'r, &c. vs. Evans.* 8 Ga..... 178
25. An allegation, that defendant caused, by the erection of a milldam, "an unhealthy pond of standing water," is not sufficient to authorize testimony as to sickness of plaintiff in consequence of the pond. *Morris vs. McCamy.* 9 Ga..... 160
26. The plaintiff is not obliged to spread out his proof upon the record. *Gilmer vs. Allen.* 9 Ga..... 203
27. If the declaration avers that the principal executed the bond, (which is the subject of suit,) by his agent, it is sufficient. *Ibid.*
28. Under our Judiciary, *profert in curiam* is necessary to be made by the plaintiff, of any note or other instrument which is the foundation of the action. *Smith vs. Simms, Adm'r.* 9 Ga..... 418
29. In declaring upon a promise, it is not necessary to set it out in *hæc verba*. It will be sufficient to set it out according to its legal tenor and effect. *Ibid.*
30. Where the occupancy of the premises of the plaintiff is admitted by the defendant, and there is no agreement as to the amount of rent to be paid, the demand of the plaintiff is a claim existing in account, and is within the provisions of the Act of 1847, and may be prosecuted under the form prescribed therein. *Cameron vs. Moore and Wife.* 10 Ga..... 368
31. The forms prescribed under that Act are not amendable, except to make them conform to the forms laid down in the Act. *Ibid.*
32. A count in trover cannot be joined with a count in trespass. *Crenshaw vs. Moore.* 10 Ga..... 384
- See *Lien, I. 2; Process.*

IV. OF DEMURRERS, PLEAS AND ANSWERS.

1. To an action of debt upon notes given for the purchase of land, defendant will not be permitted to plead misrepresentations of the value and quality of the land, made by the vendor; nor will the plea of partial failure of consideration avail him. *Hinton vs. Scott. Dudley...* 246
2. Non-residence must be pleaded, and cannot be taken advantage of, on motion in arrest of judgment. *Slaughter vs. Tompkins. Dudley...* 117

3. Under our Judiciary, no evidence is admissible under the general issue, except such as disproves the cause of action. All matters in satisfaction or in avoidance, must be specially pleaded. *Longstreet vs. Reeside & Fuller. Ga. Dec. part II.*..... 39
4. The Judiciary Act of 1799, requires of the plaintiff that he file his petition in writing, which shall contain the charge, allegation or demand, plainly, fully and distinctly set forth; and of the defendant, that he shall, on or before the last day of the term to which the petition is returnable, make his defence or answer in writing, which shall plainly, fully and distinctly set forth the cause of his defence: *Held*, that evidence of illegality of consideration, could not be admitted under the plea of the general issue. *Johnson et al. vs. Ballingalt. 1 Kelly* 70
5. Also, that under the general issue, evidence of a special contract made with the plaintiff, exempting the defendant from liability, is inadmissible. *Buchanan et al. vs. Jones. 1 Kelly*..... 257
6. In the plea of usury, the time when the original loan was negotiated, as well as the amount of usury taken and reserved, are material facts. *Winkler vs. Scudder. 1 Kelly*..... 134
7. The plaintiff is not required to produce evidence, to explain any alteration in the instrument sued on, where it is declared upon *as altered*, unless the same is denied by the defendant on oath, in his answer. *Tedlie vs. Dill. 2 Kelly*..... 131
8. A plea *puis darrein continuance* by an executor, that his letters testamentary have been revoked, and an intestacy declared in consequence of the birth of a posthumous child, and administration granted to another, to whom he has delivered over all the goods in his hands as executor, is a good plea. *Broach vs. Walker, Ex'r. 2 Kelly*..... 435
9. A demurrer only admits facts well pleaded, with a view to determine their legal sufficiency, and it cannot be used as an instrument of evidence in an issue of fact. *Alexander, Adm'r, vs. Sutlive, Ex'r. 3 Kelly*..... 30
10. After a demurrer has been argued and overruled, and the time for pleading has elapsed, it is discretionary with the Court to allow the party then to plead. *Ibid.*
11. In a *sci. fa.* to make parties, the defendant, by demurring to being made a party, on the ground that the suit set out in the record has abated, admits the existence of the action, and is estopped by the judgment overruling the demurrer, from denying the record. *Ibid.*
12. Where a plea was filed of former recovery, (not being a plea in bar:)

Held, not necessary to set out the entire record of the judgment of the Supreme Court, but only so many of the leading facts as were relied on, in a distinct and issuable manner. *Rice vs. Carey, Assignee.* 4 Ga..... 558

13. The English rule, that when a plaintiff demurs to a plea, the demurrer runs through the whole record, and it is the duty of the Court to give judgment against the party first in default, is not applicable to our Courts. *Wynn vs. Lee.* 5 Ga..... 217

14. There can be no special pleading in ejectment, for the *consent* rule which admits lease, entry and ouster, compels the defendant to plead only "not guilty," or the Statute of Limitations. *Doe ex dem. Cumming vs. Butler.* 6 Ga..... 88

15. The general issue in ejectment denies the defendant's possession, as well as the plaintiff's title. *Ibid.*

16. Where a plea of former recovery is filed, and the record tendered to support the plea, it is for the Court to determine, upon inspection and comparison, whether the cause of action is the same; and if not the same, the record will be repelled; and if it is admitted, it then also becomes a question for the Court, how far, and when, parol evidence will be admitted, to show that the cause of action was not submitted and passed upon in the former trial. *Hill and another, Adm'rs of McFarland, vs. Adm'rs of Freeman.* 7 Ga..... 211

17. In an action against the assignee of a bank, a plea that there never was an assignment made to him, and a plea that defendant is not the assignee of the bank, are pleas in bar of the action. *Dougherty vs. Bethune, Assignee.* 7 Ga..... 90

18. Dilatory pleas, when demurred to, are to be heard and decided at the first term of the Court. *Brooks vs. The Water Lot Company.* 7 Ga. 101

19. Where stockholders in a bank are liable for the *ultimate* redemption of its bills, to a suit by a bill-holder against a stockholder, a plea that the bank has assets which have not been appropriated, without specifying what they are, is demurrable for uncertainty. *Lane vs. Morris.* 8 Ga..... 468

20. Plea, that defendant signed the note sued on as surety, and that it was agreed between him and his principal that another should sign it as co-surety before it was delivered, which was not done: *Held*, that this is not a plea of *non est factum*, and need not be verified. *Oleg-horn vs. Robison.* 8 Ga..... 559

21. The plea of a *total* failure of consideration to an action upon a con-

tract under seal, on the ground of *fraud*, will be allowed in a Court of Law. *McKnight vs. Killet*. 9 Ga..... 532

22. Where the vendee purchased a tract of land of the vendor, took a deed, and went in and continued in possession thereof: *Held*, that in a suit upon the sealed bond of the vendee for the purchase money, he could not, under the provisions of the Act of 1836, plead a *partial* failure of consideration, upon the ground of the fraudulent representations of the vendor; that Act confining the plea of *partial* failure to those cases in which *total* failure could be previously pleaded. *Ibid*.
23. In an action of trespass for killing a slave, the defendant pleaded the general issue, and at the trial gave in evidence, by way of justification, that he was acting as a patrol man under the 44th section of the Act of 1770: *Held*, that so much of that Act as is *repugnant* to the Judiciary Act of 1799, which requires the defendant plainly, fully and distinctly to set forth his defence in writing, is repealed by the latter Act. *Brooks vs. Ashburn*. 9 Ga..... 297
24. Set-off is a plea in bar of the plaintiff's action. *Merriwether and another vs. Bird, Adm'r*. 9 Ga..... 595

See *Set-off*.

V. DEFECTS OR IRREGULARITIES: WHEN CURED BY PLEADING OR VERDICT.

1. The filing of the plea is a waiver of defects which can only have a formal operation. *Fitzgerald vs. Garvin et al.* T. U. P. Charl..... 283
2. A re-hearing will be granted, even after verdict, if the plaintiff's petition sets forth only a single item of account thus—"bills receivable to merchandize," without any bill of particulars. *Martin vs. Adm'r of Fiffe*. *Dudley*..... 17
3. Where the defendant does not reside in the County, by appearing and filing issuable pleas, he waives his right to be sued in the County of his residence. *Slaughter et al. vs. Thompkins*. *Dudley*..... 117
4. An agreement to submit the controversy to arbitration, is an admission that the pleadings in the cause are perfect. *Boog vs. Bagley*. R. M. Charl..... 190
5. Where the service of process is null and void, appearance and plea to the merits will not cure it. *Welman vs. Polhill et al.* R. M. Charl.. 235
6. Objection may be taken to such process at any time. *Ibid*.

7. Whenever proceedings in Court are irregular, application to set them aside should be made in the first instance. If the party, after discovering the irregularity, proceed, himself, and take subsequent steps in the cause, or lie by and suffer the other party to do so, the Court will not assist him. *Evans vs. Rogers.* 1 *Kelly* 466

8. In a suit by the *bearer*, against the *maker* of the note, the omission in the declaration to allege the time when the note was transferred, is cured by verdict or confession of judgment. *Bond vs. The Central Bank.* 2 *Kelly*..... 99

9. A declaration, with the common counts for money had and received, and for money paid, laid out and expended, without bill of particulars, though defective, is amendable; and being cured by verdict, is not good in arrest of judgment. *Dill et al. vs. Jones.* 3 *Kelly*..... 81

10. One of several tenants in common may sue separately in trover, and the defendant may plead the non-joinder in abatement; but if he fail so to plead, he cannot take advantage of it on the trial, nor by motion in arrest of judgment; but will be confined to giving in evidence, the interest of the other co-tenants in mitigation of damages; and the plaintiff may proceed to recover his proportion or aliquot interest in the common property. *Starnes and Paine vs. Quin.* 6 *Ga.*..... 84

11. After opening a default, a defendant may take advantage of a radical defect in the declaration. *Farrar vs. Baber.* *Ga. Dec. part II.* 125

12. After issue joined on the merits, it is too late to demur to the declaration for want of *profert* of letters of administration. *Smith vs. Sims, Adm'r.* 9 *Ga.*..... 418

- POOR DEBTORS. See *Insolvent Debtors.*

- POSSESSION. See *Ejectment, Execution, II. Fraud, II. Limitation of Actions.*

PRACTICE.

I. IN SUPREME COURT.

II. IN SUPERIOR AND INFERIOR COURTS.

I. IN SUPREME COURT.

1. The Supreme Court will not entertain a suggestion of the diminution of the record sent up, merely because it does not embody the formal order and special reasons of the Court below for its decision, if a clear statement of the points decided, and the grounds of the decision appear therein. *Carey, Assignee, vs. Rice.* 2 *Kelly*..... 406
2. Evidence, *aliunde* the record, certified to the Supreme Court, will not be received to show that an appeal bond was given below, and who was the surety. *Coffee et al. vs. Newsom, Ex'r.* 2 *Kelly*..... 440
3. Where there is no appearance for either party, the writ of error will be dismissed. *Smith vs. Justices, &c. Randolph County.* 4 *Ga.*..... 156
4. Where the citation misrecites the County in which the writ of error is sued out, it will be amended on motion. *Armist vs. Barker.* 4 *Ga.* 170
5. Writ of error will be dismissed if proper parties are not made by *sci. fa.* should either party die pending the writ. *Lee, Adm'r, vs. Wheeler.* 4 *Ga.*..... 541
6. Where the evidence is sufficiently set forth in the bill of exceptions, to enable the Court to understand and decide the points of law excepted to, the writ of error will not be dismissed. *Adams, Adm'r, vs. Barrett.* 5 *Ga.*..... 404
7. If the bill of exceptions bears date previous to the trial of the cause, and there is nothing in the record by which it may be amended, the writ of error must be dismissed. *Perry and Peck vs. Higgs.* 6 *Ga.*.. 43
8. If no assignment of errors is filed as required by the rule, the writ of error will be dismissed. *Goneke et al. vs. Garrett.* 6 *Ga.*..... 119
9. A writ of error will not be dismissed because the same cause has been previously before the Supreme Court, where the error assigned is different, and the objection not raised or pleaded in the Court below. *Hargraves vs. Lewis,* 6 *Ga.*..... 207

10. If the Clerk of the Circuit Court fails to make out a complete transcript of the record within ten days from the filing of the original notice, with entry of service thereon, the writ of error will be dismissed. *Leak vs. McDowell.* 6 Ga..... 264
11. Writ of error dismissed: 1st. Because notice of the signing and certifying of the bill of exceptions was not filed in the Clerk's office of the Court below. 2d. Because the Clerk of the Court below did not certify and send up to this Court, a transcript of the record and the bill of exceptions, within the time prescribed by law and the 31st rule of this Court. *Duke, Adm'r, vs. Trippe.* 6 Ga..... 317
12. Notice of the filing of a bill of exceptions is not sufficient. It must be notice of the *signing and certifying.* *Arnold vs. Wells and Wife.* 6 Ga... 380
13. The Clerk must certify and send up the record within time, and his certificate must show that fact. *Ibid.*
14. The Court will not amend a writ of error, by striking out one party and inserting another. *Ibid.*
15. The errors complained of below, must be *specified* in the bill of exceptions. *Weathers vs. Doster.* 6 Ga..... 227
16. If no notice of the signing and certifying of the bill of exceptions is served on the opposite party, and filed as the law directs, the writ of error will be dismissed. *Haygood, Adm'r, vs. Neal.* 6 Ga..... 452
17. The assignment of errors cannot enlarge the bill of exceptions, but must be supported by it. *Smith and Shorter vs. Mitchell.* 6 Ga..... 458
18. The notice of the signing of the bill of exceptions must be signed by the party or his counsel. *Ibid.*
19. It must *affirmatively* appear, either by the certificate of the presiding Judge, or the transcript of the record, that the bill of exceptions was signed and certified within thirty days from the adjournment of the term in which the cause was heard. *Cloudis vs. The Bank of Tennessee.* 6 Ga. 481. *Russell and another vs. March and Briers.* 6 Ga. 491
20. It must appear that the bill of exceptions was filed in the Clerk's office of the Court below. *Ibid.*
21. The fact must appear *affirmatively*, that the bill of exceptions was signed within the time prescribed by the Statute. *Justices, &c. vs. Barrington.* 6 Ga..... 573

22. The writ of error will not be dismissed because the record does not show that the costs in the Court below have been paid. *Brewer and another, Ex'rs, vs. Brewer.* 6 Ga..... 587
23. In an application for a new trial, the omission to file a brief of the testimony in the cause, cannot be taken advantage of in the Supreme Court, unless it was made an objection to the hearing of the motion in the Court below. *Watts vs. Kilburn.* 7 Ga..... 356
24. Where there is no appearance by the plaintiff in error, the case being called for a hearing, and the plaintiff being himself called, the defendant may open the record and pray for an affirmance of the judgment. *Chapman vs. Stiles.* 7 Ga..... 1
25. Error will not lie to the decisions of the Court below, where the party, subsequent to the decisions, voluntarily dismisses his case. *Mott vs. Hill, Adm'r.* 7 Ga. 79. See also, *Dannelly vs. Speer.* 7 Ga. 227
26. A defective record cannot be supplied in the Supreme Court by consent. *Baldwin vs. Lee.* 7 Ga..... 186
27. The party who challenges the legality of the opinion of an inferior tribunal, must prove the error by the record. The Court below is presumed to have decided correctly until the contrary is shown. *Stubbs vs. The Central Bank.* 7 Ga..... 258
28. The Supreme Court will hear a cause upon a case made. *Papot vs. Gibson.* 7 Ga..... 529
29. Where the Circuit Court misinterprets the decision of the Supreme Court on a former hearing, the cause will be remanded with instructions. *Oglesby vs. Gilmore, Adm'r.* 8 Ga..... 95
30. A writ of error will be dismissed, if a copy is not served, and an entry made thereof within the time required by the 21st Rule. *Turner vs. Collins.* 8 Ga..... 252
31. The party failing to indorse the entry of service, as required by the rule, before the writ of error is transmitted to this Court by the Clerk below, will not be permitted to come into the Supreme Court, and, on motion, have the omission supplied. *Ibid.*
32. The amended Constitution and Act of 1845, organizing the Supreme Court, exact the utmost vigilance of parties, and allow no discretion in relieving them from the failure to exercise it. *Ibid.*
33. Under the Act of February, 1850, all defects in the bill of exceptions, writ of error, and citation, may be amended instanter, and with-

- out costs, in conformity with the record of the cause below. *Higgs vs. Huson*. 8 Ga..... 317
34. A copy of the writ of error must be served as required by the rule; this right may be waived. *Chapman vs. Gray, Ex'r*. 8 Ga..... 337
35. The Court will not entertain an argument to screen a party failing to comply with the rules, by showing the rule itself to be inexpedient. *Ibid*.
36. The rules of the Supreme Court are the law of the Court until repealed, unless they are repugnant to the Constitution and Statutes of the State. *Ibid*.
37. The Act of 23d February, 1850, allowing the copy to be made out and sent up with the transcript, *on or before the first day of the term*, would seem to repeal that provision of the Act of 1845, requiring the transcript to be sent up within ten days. *Heard vs. Heard*. 8 Ga... 380
38. An application for a certificate to prevent damages being assessed under the Act of 1845, creating the Supreme Court, will not be heard after the term at which the case was determined. *Turner vs. Collins*. 8 Ga..... 436
39. Where the Clerk of the Superior Court sent up the original instead of a copy of the bill of exceptions: *Held*, that the matter could not be relieved by suggesting a diminution of the record. *O'Neal and another vs. O'Neal*. 8 Ga..... 439
40. Quere—as to constitutionality of the rule allowing continuance on suggestion of diminution of the record. *Ibid*.
41. The brief of the evidence filed on a motion for a new trial, is not a part of the record to be transmitted to the Supreme Court; and it does not dispense with the necessity of incorporating in the bill of exception, a brief of the trial and copy of the written evidence. *Wetmore vs. Chavers*. 9 Ga..... 546
42. It is not necessary to embody in the bill of exceptions, the questions propounded to a witness in interrogatories, unless the answers are unintelligible without them. *Carey, Assignee, vs. Giles, Receiver*. 10 Ga. 1
43. Documentary evidence, upon which no exception is founded, and which is not necessary to the elucidation of any ground of error taken in the bill, need not be embraced therein. *Ibid*.
44. Documentary evidence which is appended to a bill in Equity or an answer, as an exhibit, and which is, therefore, a part of the record,

and must come up under the certificate of the Clerk, need not be embodied in the bill of exceptions. *Ibid.*

45. Documentary evidence which is referred to and described in the bill of exceptions and copies of which are appended thereto as exhibits, and which exhibits are certified to be true by the presiding Judge, need not be embodied in the bill of exceptions. *The better practice*, however, is to copy them in the bill. *Ibid.*
46. Where the ground of error is the judgment of the Court on the sufficiency of a plea in bar of a former judgment, which plea recites the former judgment in substance, and comes up with the record under the certificate of the Clerk, it is not necessary that such former judgment or the record which contains it, should be embodied in the bill of exceptions. *Ibid.*
47. A continuance will not be granted in the Supreme Court for the absence of counsel, when the original counsel are before the Court. *Bulloch vs. The State.* 10 Ga..... 46

See *Amendments, I.; Continuance; Bill of Exceptions; Error.*

II. IN SUPERIOR AND INFERIOR COURTS.

1. If a defendant has his testimony in Court, and refuses to introduce it at a proper time, resting his case upon matter of law, and the benefit of a concluding argument, he cannot, after the case has been argued for the plaintiff, change his position and introduce his testimony. *Stewart vs. Grimes et al. Dudley*..... 209
2. A defendant has a right to demand a trial, and the Court will not continue the cause where no legal ground is shown, merely from motives of delicacy. *Simmons vs. Sheftall. R. M. Charl*..... 90
3. When the process of the Court is attempted to be used oppressively and against justice, as by levying an execution after judgment has been satisfied, the Court will grant relief, *upon motion.* *Watts & Joyner vs. Norton. R. M. Charl*..... 353
4. If it requires information of matters of fact, it will cause an issue to be made up for that purpose. *Ibid.*
5. A Court of Law cannot distribute money by rule, unless the rights of the parties are so clear, as not to need equitable interposition. *Habersham & Son vs. Miller et al. Ga. Dec. part II.*..... 46
6. A note cannot be objected to as evidence, after it has been read, and proof offered to defeat it. *Garner vs. Hopgood et al. Ga. Dec. part II.* 131

7. On an appeal from a Court of Ordinary, a motion to set aside a will once proved, the party attacking the will holds the affirmative. *Bonds vs. Gray. Ga. Dec. part II.*..... 136
8. The propounder of the will, in such a case, cannot dismiss the proceedings. *Ibid.*
9. In an appeal on a caveat to the probate of a will, the propounder holds the affirmative. *Ibid.*
10. The entry on the Bench Docket, of two general continuances, without anything appearing upon the minutes of the Court, will not work a *discontinuance* of a cause, so as to entitle the defendant to a judgment of *non pros.* under the law and Rules of Practice in this State. *Nisbet vs. Lawson. 1 Kelly.*..... 279
11. The entry of "parties made" on the Motion Docket, in a case where a *sci. fa.* to make parties has been issued and returned executed, is insufficient to make the representatives parties in the cause. *Bryant, Guardian, et al. vs. Owens and Wife. 1 Kelly.*..... 367
12. The party sued must make his defence promptly and in the proper manner. *Stroup vs. Sullivan & Black. 2 Kelly.*..... 281
13. When a verdict is returned, but not entered on the minutes, it may, at the succeeding term, be entered, *nunc pro tunc.* *Hall vs. The State. 3 Kelly.*..... 23
14. Notice of a motion to establish a lost office paper, is not indispensably necessary. *Saunders vs. Smith, Adm'r. 3 Kelly.*..... 127
15. A cause not reached at the term, stands over as a case continued. *Smith, Adm'r, et al. vs. Thompson. 3 Kelly.*..... 26
16. A libel should not be read to the Jury until the defendant has cross-examined the witness proving its publication. *Taylor vs. The State. 4 Ga.*..... 14
17. The Judge may make rules for new trials *returnable* in vacation, where the application *has first been made in term and recorded.* *Johnson vs. Bemis. 4 Ga.*..... 157
18. The English rule, that when a plaintiff demurs to a plea, the demurrer runs through the whole record, and it is the duty of the Court to give judgment against the party first in default, is not applicable to our Courts. *Wynn vs. Lee. 5 Ga.*..... 217
19. In the argument of a cause before the Jury, the party entitled to the

conclusion shall state to opposing counsel the grounds in the pleadings, upon which he expects to rely, and the points of law he intends to make to the Court, and shall read or present to him the authorities he intends to use. And the counsel, in conclusion, shall be confined to the grounds, points and authorities thus *exhibited*. *Ibid*.

20. An exception to a declaration, taken at the *trial term*, which would not be good in *arrest of judgment*, will not be allowed. *Hall et al. vs. Carey, Assignee. 5 Ga.*..... 239
21. A rule *nisi*, to set aside a non-suit, "so soon as counsel can be heard," is not returnable absolutely during the term, but is to be considered at the convenience of the Court. *King and Hooper vs. Carey, Assignee. 5 Ga.*..... 270
22. If the minutes show no action on such a rule, it will not be dismissed for default of plaintiff, but will be considered as continued by the Court. But if the opposite party move to speed the cause, and the movant shows no sufficient excuse, then *Quere. Ibid.*
23. A rule *nisi* is sufficiently certain, which sets forth the grounds taken, so plainly, as to notify the opposite party of what he is called to answer, and to enable the Court to render a certain judgment on them. *Ibid.*
24. A rule *nisi* will not be dismissed for uncertainty, because not returnable on a day certain in term. *Ibid.*
25. After a cause has been submitted to a Petit Jury, either party has a right to confess judgment, reserving the liberty of appeal, with or without the consent of the other party. *Hicks vs. Ayer. 5 Ga.*..... 298
26. The 61st Rule, requiring a brief of the testimony to be filed in all applications for a new trial, is *imperative*, and if not complied with, the rule *nisi* will be dismissed. *Turner vs. Rawson. 5 Ga.*..... 399
27. This Court will not interfere with the established practice of the Circuit Courts of Georgia, in relation to the alternative form of the verdict in trover. *Foster vs. Brooks, Adm'r. 6 Ga.*..... 287
28. On an appeal from an order of the Court of Ordinary, establishing a will, the burden of proof, as to the capacity of the testator, rests upon the party claiming under the will; and the propounder must go forward on the trial, and is entitled to open and close the argument. *Potts vs. House, Ex'r. 6 Ga.*..... 324
29. A *retraxit* is a voluntary renunciation by the plaintiff, in open Court,

- of his suit; and a judgment thereon is a complete bar to a subsequent action for the same cause. *Justices, &c. vs. Selman and others.* 6 Ga. 432
30. A *dismissal* of a suit does not, in this State, amount to a *retraxit*, and is no bar to a future suit for the same cause of action. *Ibid.*
31. It is not the right of the parties to poll the Jury in a civil case, but it is discretionary with the Court to allow them to be polled or not. *Smith and Shorter vs. Mitchell.* 6 Ga..... 458
32. The dispersion of the Jury, after the verdict is handed in to the Clerk, and before it is received by the Court: *Held*, to be a good reason for a refusal to permit the Jury to be polled. *Ibid.*
33. On a motion to arrest the reading of depositions of an agent, on the ground that his authority was in writing: *Held*, that this is a fact for the finding of the Court, which the Supreme Court will not interfere with, except in a clear, strong case. *Crenshaw vs. Jackson.* 6 Ga..... 509
34. Such a motion is irregular, and the better practice is, for the reading to proceed; and upon proof afterwards, that the testimony is illegal, to move its withdrawal from the Jury. *Ibid.*
35. Dilatory pleas, when demurred to, are to be heard and decided at the first term of the Court. *Brooks vs. The Water Lot Company.* 7 Ga..... 101
36. Declarations founded on the process of attachment, must be filed at the first term to which the attachment is made returnable. *Birdsong & Sledge vs. Brooks.* 7 Ga..... 88
37. An amendment to a declaration will be allowed, changing the christian name of the plaintiff from *William* to *James*, where it manifestly appears to the Court such an amendment will be in furtherance of justice. *Woodson vs. Law.* 7 Ga..... 105
38. A party cannot dismiss his action after the publication of the verdict, and the verdict shall be considered as published, *eo instanti* that it is handed to the counsel or other person directed by the Court to receive it. *The Merchant's Bank vs. Rawley, Adm'r.* 7 Ga..... 191
39. A plaintiff in ejectment may amend his declaration, extending the time of his demise, after the case has been submitted to the Jury, according to the discretion of the Court, under the 54th Common Law Rule of Practice. *English vs. Doe ex dem. Register.* 7 Ga..... 387
40. On applications for new trials, a brief of the testimony required by

- the 61st Common Law Rule of Practice, need not be entered on the minutes of the Court, but must be of file. *Spears vs. Smith.* 7 Ga. 436. See, also, *Tomlinson vs. Cox.* 8 Ga. 111
41. The 4th Common Law Rule of Practice, which authorizes a continuance on appeal trials, for the purpose of making a substantial amendment to either declaration or answer, does not apply to Equity causes. *Berry et al. vs. Matthews et al.* 7 Ga. 457
42. The 6th section of the Judiciary Act of 1799, and the 57th Common Law Rule of Practice, requiring the production of books and papers at the trial, upon ten days' notice, do not apply to Equity causes. *Ibid.*
43. The question discussed, whether under our Statute, where the defendant, upon a plea of set-off, recovers a balance against the plaintiff, the plaintiff has a right, on the appeal, to dismiss his action, so as to defeat the judgment. *Attaway, Guardian, vs. Dyer et al.* 8 Ga. 184
44. Where a cause has been continued, and at the same term the plaintiff tenders a confession of judgment for costs, which the defendant refuses to accept or the Court to allow, on the ground that the case had been continued, but the confession was nevertheless entered by the Clerk, by the direction of plaintiff's attorney: *Held*, that the confession was a nullity. *Barefield vs. Bryan.* 8 Ga. 463
45. A suit may be dismissed after a continuance, at the same term or during vacation. *Ibid.*
46. Under our Judiciary, after a general demurrer has been filed and argued, and the judgment of the Court pronounced thereon, it is not proper to allow it to be withdrawn. *Lane vs. Morris.* 8 Ga. 463
47. Where a party makes application for letters of administration, and it is resisted by other parties setting up a will, the party applying for administration is the promovant, and entitled to open and conclude the argument to the Jury. *Weeks and Wife vs. Sego.* 9 Ga. 199
48. The defendant, by demurring, admits the ability of the plaintiff to sustain all the allegations in his declaration, by proper proof. *Gilmer vs. Allen.* 9 Ga. 208
49. An *alias fi. fa.* cannot regularly issue, without an order of the Court for that purpose, which order should set forth all the previous proceedings which had taken place under the original execution. *Watson vs. Halsted, Taylor & Co.* 9 Ga. 275
50. Where a verdict was rendered in a claim case, in which the plaintiff

- had been dead four years, and whose estate was unrepresented before the Court: *Held*, that the verdict ought to have been set aside, on motion. *Ellis vs. Francis*. 9 Ga..... 325
51. On an appeal to the Superior Court from the amount of damages assessed by appraisers, appointed by the Inferior Court, under a special Statute, the party originally moving in the case below, is entitled to open and conclude. *Harrisons vs. Young*. 9 Ga..... 359
52. Where testimony is suffered to go to the Jury without objection, and no effort is made to withdraw it from their consideration, it is too late, after the argument has closed, to call upon the Court to charge the Jury that it was illegally admitted. *Ibid*.
53. Exceptions to the sufficiency of a rule against the Sheriff, taken upon the trial, 18 months after the filing of the rule, come too late. *Thompson vs. The Central Bank*. 9 Ga..... 413
54. After issue has been joined on the merits, it is too late to demur to the declaration, for want of *profert* of letters of administration. *Smith vs. Simms, Adm'r*. 9 Ga..... 418
55. Where a party confesses judgment against himself, under a mistake of fact as to what the pleadings contain, he may, upon discovering his error, retract the confession, provided it has not been recorded. *Ibid*.
56. The 47th Common Law Rule of Practice, requiring testimony taken by commission to be communicated to the adverse party, before the cause is called for trial, is *directory* merely. *Beverly and another vs. Burke*. 9 Ga..... 440
57. On the trial of a *sci. fa.* against bail, the defendants are not entitled to a Jury trial, unless they file such an issuable plea as will require the intervention of a Jury to try it. *Davidson vs. Carter & Ritch*. 9 Ga..... 501
58. When it appeared on the face of a record that there was a competent number of Jurors to render a verdict, such verdict may be signed by one as foreman, in behalf of himself and his fellow-Jurors. *Ibid*.
59. Upon applications for a new trial, it is the better practice, when the rule *nisi* is granted upon any ground taken, to let all the grounds stand over for consideration, upon a motion to make the rule absolute. *Stanley vs. The State*. 10 Ga..... 82
60. It is competent for the Court to withdraw from the Jury the con-

- sideration of evidence which has been illegally admitted. *Salter vs. The Lessee of Williams*. 10 Ga..... 186
61. The plaintiff in *fi. fa.* may dismiss his levy on the appeal, notwithstanding he has confessed judgment against himself on the first trial. *Favor vs. Stokes*. 10 Ga..... 370
62. A party showed for a continuance, that the commission had been forwarded to the State of Alabama, where it was understood the witness resided, and was returned unexecuted because he had removed from that State, and on that account the cause had been once continued; that he had learned the Parish in the State of Louisiana to which the witness had removed, but did not know at what place in the Parish he lived; that he had continued to make inquiry, but had not forwarded a commission: *Held*, that the showing was insufficient. *Moody and Wife vs. Davis*. 10 Ga..... 403
63. In accordance with the practice which prevails in most of the circuits in this State, costs cannot be taxed against the losing party, for the attendance of witnesses who are summoned but not sworn. *Mason & Waldrip vs. Dean & Nash*. 10 Ga..... 443
64. For counsel to attempt, surreptitiously, to get before the Jury facts *by way of supposition*, which have not been proven, is highly reprehensible; and the practice should be instantly repressed by the Court, without waiting to be called upon by the opposite party. *Berry vs. The State*. 10 Ga..... 511
65. It is the duty of the Court to keep the Jury together, in a criminal case, from the time it is submitted to them until they are finally discharged from its consideration. No application should be addressed by the Court to counsel, to allow the Jury to disperse. *Ibid.*
66. Should the counsel on both sides unite in petitioning the Court to permit the Jury to disperse, there would, perhaps, be no impropriety in granting the application—at any rate, in the trial of petty offences; still, it is a discretion which should be very cautiously exercised under any circumstances. *Ibid.*
67. The administration of justice should not only be pure, but above suspicion. *Ibid.*

As to PRACTICE IN EQUITY. See *Equity*, VI.

See, also, *Amendments*, II.; *Appeals*; *Bill of Exceptions*; *Continuance*; *Criminal Law*, III.

PRESCRIPTION. See *Limitation of Actions*.

PRESUMPTION. See *Evidence*, XII.

PRINCIPAL AND AGENT.

- I. GENERALLY: AND HEREIN OF RATIFICATION AND EVIDENCE OF AGENCY.
- II. RIGHTS, POWERS AND LIABILITIES OF AGENTS.
- III. RIGHTS, POWERS AND LIABILITIES OF PRINCIPAL.
- IV. PUBLIC AGENTS.

I. GENERALLY: AND HEREIN OF RATIFICATION AND EVIDENCE OF AGENCY.

1. Where an agent had lost the money of his principal at faro, and an action for money had and received, was brought by the principal, it was held that the agent was not a competent witness until released—a release officially attested by a Notary Public is sufficient. *Allen vs. Lacy et al. Dudley*..... 81
2. Service of process on the agent of defendant, is null and void in Georgia. *Welman vs. Polhill et al. R. M. Charl.*..... 235
3. Payment by surety, and his subsequent re-imbursement by his principal, do not, in Law, constitute such surety the agent of his principal by ratification. WARNER, J. dissenting. *Whitehead vs. Peck. 1 Kelly.* 151
4. With regard to an agency by ratification, the maxim of the law is, *every consent given to what has been already done, has a retrospective effect, and equals a command.* Per WARNER, J. in his dissenting opinion. *Ibid.*
5. The fact that the surety made the payment, does not weaken his authority as agent, in making it for his principal, in a legal point of view, but on the contrary, greatly strengthens it. Per WARNER, J. *Ibid.*
6. If a person assuming to act as the agent of a corporation, but without legal authority, makes a contract, and the corporation receive the benefit of it, and use the property acquired under it, such acts will ratify the contract and render the corporation liable thereon. *Merchant's Bank vs. Central Bank. 1 Kelly*..... 428
7. In the execution of an instrument under seal by an agent, the general rule is, that it must purport upon its face to be the contract of the principal, and his name must be inserted in it and signed to it. *Ibid.*

8. In the case of instruments not under seal, executed by agents, if it appear from the face of the paper that the credit was not given to the agent, and the name of the principal was disclosed at the time of the transaction, and the act was within the power of the agent, the principal is bound. *Ibid.*
9. Upon such contracts, where the intent is not sufficiently clear, that the principal was to be bound, the defect may be supplied by parol testimony. *Ibid.*
10. Where money was paid by A to B, who said he paid it for C, and by his direction: *Held*, that A was a competent witness to prove to whom the money belonged, and by whose directions he paid it to B; and that his declarations were not admissible in evidence, to prove that fact. *Williams vs. Kelsey & Halsted.* 6 Ga..... 365
11. A payment to the authorized agent, is a payment to the principal. *Hodnett vs. Tatum.* 9 Ga..... 70
12. The principal cannot ratify the acts of his agent in part, and repudiate in part, in relation to the same transaction. He must either adopt the whole or none. *Ibid.*
13. Though a subsequent ratification by a principal will confirm an assumed agency, not so, if the agency be in itself illegal. *Harrison vs. McHenry.* 9 Ga..... 164
14. The registry of the deed of settlement between husband and wife, accompanied by the management of the trust property by the husband is, as to third persons, evidence of his agency for the trust property. *Wylly vs. Collins et al.* 9 Ga..... 223
15. Although the husband, as such, has no right to control the separate estate of his wife, yet he may, like any other person, do a ministerial act, such as purchasing goods for the trust estate. *Ibid.*
16. Taking the note of the manager of the trust estate, in settlement of the account for goods debited to the manager individually, but which went to the use of the *cestui que trusts*, does not relieve the trust estate from liability to pay out of its income, where it does not appear that exclusive credit was given to the agent. *Ibid.*
17. The circumstance of the agent being given, does not vary the rule that one simple contract does not extinguish another. *Ibid.*
18. If the written promise of the principal debtor does not discharge the debt, *a fortiori*, the note of the agent can have no higher efficacy. *Ibid.*

19. Where the principal adopts and ratifies the acts of his agent, such adoption and ratification relates back to the time of the transaction, and is deemed in law the same for all purposes, as if given in the first instance. *Perry, for the use, &c. vs. Hudson.* 10 Ga..... 362
20. Where the principal, with knowledge of the facts, adopts and acquiesces in the acts done under an assumed agency, he cannot afterwards be heard to impeach them, under the pretence that they were done without authority or contrary to instructions. *Ibid.*
21. Where a warrant of attorney, "ratified" and "confirmed" an appeal previously entered, "without incurring cost to me:" *Held*, that the authority of the agent was ratified by the principal, and the principal was bound for all costs necessarily incident to the appeal, notwithstanding the qualification in the power of attorney. *Scranton et al. vs. Demere et al.* 6 Ga..... 92

See *Sale*, I. 17.

II. RIGHTS, POWERS AND LIABILITIES OF AGENTS.

1. An agent in fact, who had applied for letters of administration in the name of his principal, has no right to enter and prosecute an appeal from the Court below, in his own name. *Tupper vs. Atwood.* R. M. Charl 100
2. An agent of an Insurance Company may maintain an action in his own name, on a note belonging to the company, provided it be indorsed in blank, or made payable to bearer. *Nisbet vs. Lawson.* 1 Kelly..... 284
3. An agent has no right to direct the payment of his principal's money to his own debt. *Ibid.*
4. A general power to discount bills of exchange, confers on the agent the power to indorse. *Merchant's Bank vs. Central Bank.* 1 Kelly.. 428
5. An agent who admits money in his hands belonging to his principal, is liable for interest thereon from the time he received it. *Anderson et al. vs. The State.* 2 Kelly..... 373
6. In actions against agents, for money voluntarily paid by mistake in fact, the true distinction is, where the agent has paid the money over to his principal in good faith, he is not *personally* liable; but when he has not paid it over, or before such payment he has notice of the mistake and is required not to pay it, then he is *personally* responsible, although payment to his principal may have been made. *Law vs. Nunn,* 8 Kelly..... 93

7. Where an agent was to have ninety days within which to account for goods consigned to him, no right of action accrues to the principal until the expiration of that time. *Hall vs. Page.* 4 Ga..... 428
8. A special agent, by mingling his goods with those of his principal, cannot create a tenancy in common. *Ibid.*
9. A promissory note given by an agent, will bind the corporation, provided he acts within the sphere of his powers, or the act was subsequently ratified. *Butts vs. Cuthbertson et al.* 6 Ga..... 166
10. A distress warrant for rent, under the Act of 1811, which is issued on the oath of an agent, is irregular and void; it can only issue on the oath of the person to whom the rent is due. *Howard and others vs. Dill & Co.* 7 Ga..... 52
11. Where P entered into a special written contract with R, as an overseer for the year 1847, and was to receive a stipulated portion of the crop, at the end of the year, for his services, and in the month of August, R dismissed him from his employment, without sufficient cause or provocation; whereupon P, in the month of November of the same year, instituted his action against R, to recover damages for a breach of the contract: *Held*, that the action was not *prematurely* brought, and that in regard to this particular class of special contracts, where the overseer or agent is *wrongfully* dismissed from the service of his employer, he has his election of three remedies: 1st. He may bring his action immediately for any special injury he may have sustained in consequence of the breach of the contract by the defendant. 2d. He may wait until the termination of the period for which he was employed, and then sue upon the contract and recover his whole wages. 3d. He may treat the contract as rescinded, and may immediately sue on a *quantum meruit* for the work and labor he actually performed. *Rogers vs. Parham.* 8 Ga..... 190
12. A payment to an authorized agent, is a payment to the principal. *Hodnett vs. Tutum.* 9 Ga..... 70
13. There is no Statute in Georgia, authorizing an agent to execute a forthcoming bond for property levied on by attachment. *Gilmer vs. Allen.* 9 Ga..... 208
14. Where a Constable who did not write a good hand, requested a Justice of the Peace, in his presence, to make a return of no property on two *fi. fas.* he knowing the same to be true: *Held*, that the return was to be considered as the act of the Constable himself. *Ellis vs. Francis.* 9 Ga..... 325

III. RIGHTS, POWERS AND LIABILITIES OF PRINCIPAL.

1. The doctrine, that the principal is not liable to one agent or employee, for damages occasioned by the negligence or misconduct of another agent or employee, is not applicable to slaves. *Scudder vs. Woodbridge*.
1 *Kelly*..... 198
2. If a person assuming to act as the agent of a corporation, but without legal authority, makes a contract, and the corporation receive the benefit of it and use the property acquired under it, such acts will ratify the contract and render the corporation liable. *Merchant's Bank vs. Central Bank*. 1 *Kelly*..... 428
3. In the execution of an instrument under seal by an agent, the general rule is, that it must purport upon its face to be the contract of the principal, and his name must be inserted in it and signed to it. *Ibid*.
4. In the case of instruments not under seal, if it appear from the face of the paper that the credit was not given to the agent, and the name of the principal was disclosed at the time of the transaction, and the act was within the power of the agent, the principal is bound. *Ibid*.
5. Upon such contracts, where the intent is not sufficiently clear, that the principal was to be bound, the defect may be supplied by parol testimony. *Ibid*.
6. A promissory note given by an agent, will bind the corporation, provided he acts within the sphere of his power, or the act was subsequently, ratified. *Butts vs. Cuthbertson et al.* 6 *Ga*..... 166
7. Where a warrant of attorney was executed under the rule of the Court, to confirm an appeal by the agent of the party, in which it was recited that he "ratified" and "confirmed" all that the agent had done, or might thereafter do, in the premises, "without incurring cost to me": *Held*, that this was a ratification by the principal, and he was bound for all costs incident to the entering, notwithstanding the qualification in the power of attorney. *Scranton et al. vs. Denere et al.* 6 *Ga*..... 92
8. In an action against a special agent, who collects money for his principal, it is not incumbent on the plaintiff to prove that he has not accounted for or paid it over. *The Merchants' Bank vs. Rawls et al.*
7 *Ga*..... 191
9. If one sells property of another, without authority, the owner may waive the tort and sue him for the money. *Ibid*.

10. Where P, without authority of law, sold the land of N to P & H, after the death of N, and before administration on N's estate, and received a part of the purchase money therefor: *Held*, that the administrator of N could not maintain an action against P for money had and received to his use, nor for the use of the estate of N, for the reason that the legal representatives of N had not been deprived of any legal or equitable interest in the land, by such unauthorized sale, as would equitably entitle them to recover the purchase money therefor. *Crews, Ex'r, vs. Heard, Adm'r.* 7 Ga..... 60

IV. PUBLIC AGENTS.

1. Public agents contracting in behalf of the public, are not individually liable for the payment of such contracts; as where a note was given by four individuals, who were acting as Justices of the Inferior Court for the County of Heard, for the erection of a Court house for the benefit of the County, under the authority of a public Statute, they are not individually bound. *Ghent et al. vs. Adams.* 2 *Kelly*..... 216
2. Where the makers signed the note with the addition of the initials, J. I. C. to their names, parol evidence is admissible for the purpose of showing (when there is any doubt) whether the contract was in fact made in their individual or official capacity. *Ibid.*
3. In a suit upon an instrument, reading "We, the trustees of Oak Chumpna Academy, promise, &c." *Held*, that defendants might prove that plaintiff contracted with them as agents, giving the credit to their principal; and that plaintiff might show by parol, that he contracted with them personally, and gave credit to them individually. *Cleanland vs. Stewart et al.* 3 *Kelly*..... 297

PRISON BOUNDS. See *Insolvent Debtors*.

PRIVATE WAYS. See *Constitutional Law, IV. 11. Roads and Ways*.

PROCESS.

1. Service of petition and process on agent of defendant, is null and void, under the law of Georgia. *Welman vs. Polhill et al.* R. M. Charl... 235
2. Where the service is void, appearance and plea to merits will not cure it. *Ibid.*
3. Objection may be taken at any time. *Ibid.*

4. Process taken out more than twenty days before the next ensuing term of the Court to which it is made returnable, and not returned to such next ensuing term, but altered and made returnable to another term, to be held after the one to which it was first made returnable, is void under the provisions of the Judiciary Act of 1799. *Bank of St. Marys vs. Mumford & Tyson.* 6 Ga..... 44

PROFERT. See *Pleading*.

PROHIBITION.

1. Prohibition will not be granted, unless the party is in danger of being injured by some suit actually depending; it is not sufficient that he merely fears that a suit may be commenced, in which he might suffer damage. *Mealing et al. vs. City Council of Augusta.* Dudley,.... 221
2. The writ will be granted against an Inferior Court exercising a jurisdiction which is unauthorized by law. *Ex parte Putnam.* T. U. P. Charl 76

PROMISSORY NOTES.

- I. GENERALLY: WHAT IS; NEGOTIABILITY; CONSIDERATION.
- II. INDORSEMENT AND TRANSFERS: AND HEREIN OF DEMAND AND PROTEST.
- III. OF THE EQUITIES BETWEEN THE PARTIES: WHEN SUBJECT.
- IV. OF NOTICE TO SUE.
- V. SUITS THEREON: AND HEREIN OF WHO MAY SUE: DEFENCES.
- VI. PARTIES, WHEN WITNESSES.

I. GENERALLY: WHAT IS; NEGOTIABILITY; CONSIDERATION.

1. Where a Statute required a *bond*, with security, to be taken for the rent of a public bridge, and in lieu thereof a promissory note was taken, on suit brought to recover the amount of such note: *Held*, that the Statute was substantially complied with, and that the note was not void. *Central Bank vs. Kendrick.* Dudley..... 67
2. The Legislature of Georgia, in making promissory notes negotiable,

- whether given for money or other thing, *ipso facto*, made them exempt from the necessity of proving consideration. *Daniel vs. Andrews*.
Dudley 157
3. The execution of a promissory note is evidence, in law, of a full settlement of all accounts up to the date thereof, except such as are specially excepted at the time. *Mills vs. Mercer*. *Dudley*..... 160
4. The Court refused to decide that a note given in consideration of forbearance to sue, is void for want of consideration; but when the cause of action forborne is clearly illegal and void, the note given in consideration of forbearance is tainted with the nature of that cause of action. *Slack vs. Moss*. *Dudley* 161
5. An interlineation of the words "or bearer," in a due bill, is a material alteration, and will vitiate the instrument, unless it is proven to have been made by the maker or by his consent. *Scott vs. Walker*.
Dudley 244
6. A note given in compromise of a suit by *sci. fa.* to condemn land under the Lottery Law of 1825, is in violation of that Statute, contrary to public policy, and void as between maker and payee; and its consideration may be inquired into in a suit between the original parties. *Poe vs. The Justices of the Peace*. *Dudley*..... 249
7. A bill of sale to a slave, containing warranty of soundness, is neither at Common Law, or by the Statute of Anne, or by our own Act of 1799, negotiable by indorsement, so as to vest in the indorsee a right of action on the warranty. *Broughton vs. Badgett*. 1 *Kelly*..... 77
8. The Act of 1799 makes the instruments therein enumerated negotiable "in such manner and under such restrictions, as are prescribed in the case of promissory notes." They must be payable to *the payee's order or assigns*, or to *the bearer*, as prescribed by the Statute of Anne. *Ibid.*
9. Can an instrument, under seal, be transferred by an indorsement not under seal? *Ibid.*
10. The Act of 1799 has reference exclusively to *liquidated* demands, whether for money or other things, and applies to those instruments alone, which are for payment of an ascertained sum of money, or of some specific article or articles of property. *Ibid.*
11. A note to be negotiable by indorsement, so as to give a right of action to the indorsee, in his own name, must contain negotiable words, giving it a transferrable quality; it must be payable to the payee, or

- his order, or assigns, or to bearer, in pursuance of the Statute of Anne. Reed, use of Holly, vs. Murphy. 1 Kelly..... 287*
12. A note without such negotiable words, is a valid instrument between the parties, and is entitled to the allowance of the *three days of grace*, and may be declared on as a promissory note within the Statute; but it cannot be transferred or negotiated, so as to enable the assignee to sue upon it in his own name. *Ibid.*
13. Although an instrument contains at the foot of it a memorandum, specifying the mode in which it may be discharged, still, if it be for a sum certain, payable absolutely and unconditionally, on a day fixed on the face of it, it is a good, negotiable promissory note, and may be declared on as such. *Pool vs. McCrary. 1 Kelly..... 321*
14. When a note is signed by the makers, with the initials of J. I. C. to their names, it is competent to show, by parol evidence, that they acted in their official capacity, as agents of the public. *Ghent et al. vs. Adams. 2 Kelly..... 217*
15. Where the instrument read, "We, *the Trustees of Oak Chumpna Academy* promise to pay, &c.:" Held, that the makers were *personally* liable, and the words, *Trustees, &c.* were mere words of description. *Cleaveland vs. Stewart et al. 3 Kelly 292*
16. Failure of consideration is a good plea to a note given by the Sheriff, in discharge of a rule absolute against him, to pay the money due on an execution, when that rule is subsequently rescinded as illegal and unjust. *Barrow vs. Chipman. 4 Ga..... 200*
17. In the distribution of the estate of an intestate, promissory notes are upon the same footing with "bonds and other obligations." *Davis et al. vs. Smith et al. 5 Ga..... 274*
18. As a general rule, the holder of negotiable paper will be presumed to be a *bona fide* holder, and will not be bound to prove that he has paid value for it, until the other party shows a want or failure of consideration, or that the note had been lost or stolen before it came to the possession of the holder. *Nell vs. Snowden. 5 Ga..... 1*
19. In an action by an assignee on the following instrument, "I agree to take of Burr, Mizell & Co. a fifty-saw cotton gin, cast-steel saws, fine teeth, and improved brush, nine inches in the circle; the gin to be delivered at my house by 1st September next. The said Burr, Mizell & Co. warrant the said gin to perform well in every respect, or they will make it do so at their own expense. For which I promise to pay Burr, Mizell & Co. or bearer, one hundred dollars, by 1st January, 1847:" Held, that failure of consideration might be pleaded and proved. *Hodges vs. Hall. 5 Ga..... 163*

20. A note made payable to A, "lawful attorney of B," is payable to A. *Anstell, Adm'r, vs. Rice et al.* 5 Ga..... 472
21. An inquiry can be made into the consideration of a promissory note, whenever the proper administration of Justice requires it. *Butts vs. Cuthbertson et al.* 6 Ga..... 166
22. Whenever a Statute gives a summary remedy for services rendered, the taking of a promissory note does not waive the statutory lien. *Ibid.*
23. A promissory note given by an agent, will bind the corporation, provided he acts within the sphere of his powers, or the act was subsequently ratified. *Ibid.*
24. If A gives his promissory note to B, in liquidation of the book debt of C; it does not of itself destroy the account: nor is it, without other proof, such a payment that the original debt cannot be resorted to. *Ibid.*
25. A note given by an infant for necessities, is valid. *Per LUMPKIN, J. Ibid.*
26. A judgment has no lien on promissory notes in the hands of the defendant; nor are choses in action liable to be seized and sold under execution, unless made so specially by Statute. *McGehee vs. Cherry.* 6 Ga..... 550
27. A defendant in *fi. fa.* has the right to transfer promissory notes in his possession to other than judgment creditors, in satisfaction of their claim. *Ibid.*
28. The following paper held to be a promissory note, and the indorser liable thereon:
- "PL. & MECH. BK. OF COLUMBUS, Jan. 29, 1842.
- "\$3,987 79.
- "Gen. James C. Watson, has deposited in this bank, three thousand nine hundred and eighty-seven 79-100 dollars, which sum said bank will pay to him or his order, on this certificate, on the first day of January next. [Signed,] M. ROBERTSON, Cashier.
- Indorsed, J. C. Watson, D. McDougald, M. Robertson." Carey, Assignee, vs. McDougald.* 7 Ga..... 84
29. Where an acknowledgment was written on the back of a note, in the following words: "I do hereby acknowledge the credit of three hundred and thirty-two 30-100 dollars to be due to the estate of Drewry Brewer, deceased. August 5, 1847." [Signed,] "CLARK BREWER:" *Held*, that the instrument might be declared on, and offer-

- ed in evidence as a due bill, and that the plaintiffs need not prove the consideration for which it was given. *Brewer vs. Brewer, Ex'rs.* 7 Ga. 584
30. A receipt given for cotton stored with a warehouse man, is not a promissory note, though the promise may be to deliver to bearer. *Smith vs. Picket.* 7 Ga..... 104
31. A limitation of a promissory note in remainder, by will or deed, is valid. *Broughton, Adm'r, vs. West.* 3 Ga..... 248
32. The cutting off the name of a surety to a joint and several note, with the consent of the payee, is not such a material alteration as will invalidate it. *Ibid.*
33. A note given for the purchase of a public office, is void, being opposed to public policy, and the Statute forbidding the sale of public offices. *Grant and another vs. McLester.* 8 Ga..... 553
34. The following instrument declared a promissory note: "This is to certify that I did, in the year 1844, purchase of B. F. W. his tan-yard and stock; for which I did promise to pay B. T. L. for the benefit of B. F. W. \$475, which amount I hereby acknowledge to be unpaid and yet due; and one note of hand for \$53, which note is said to be lost or mislaid, each amount bearing interest from 1st Jan. 1845. Signed, J. A. S. Sept. 23, 1847." *Lowe vs. Murphy, Adm'r.* 9 Ga..... 338
35. The general rule is, that where a party receives a note as collateral security, without any special agreement, he must use ordinary care and diligence in collecting it, and if any loss should accrue to the other party, by reason of the want of such care and diligence, the law will compel him to make good the loss, but if there is any special agreement between the parties, then they will be bound by such special agreement and not by the general rule. *Lee vs. Baldwin.* 10 Ga..... 209

II. INDORSEMENT AND TRANSFER: AND HEREIN OF DEMAND AND PROTEST.

1. The omission by the indorser and holder of a note, to charge in execution a prior indorser, (who had been surrendered by his bail, before judgment, and discharged in consequence of such omission,) will not operate to discharge a subsequent indorser from his liability to such holder. *Wakefield vs. Lambert. R. M. Charl.*..... 13
2. Accommodation indorsers are not liable to contribution as sureties in Georgia, either at Common Law, or under the Act of 1826. *Stiles vs. Eastman et al.* 1 Kelly..... 210

3. Separate judgments are rendered against the indorsers of the same note: the two last, by agreement with the plaintiffs, take an assignment of the judgment against the first indorser, and pay the plaintiffs the amount due upon the judgments against themselves, which are entered satisfied: *Held*, the judgment so assigned is not extinguished by the satisfaction of the judgments against the two last indorsers, and that they might proceed under such assignment with the *fi. fa.* against the first indorser, and by levy and sale re-imburse themselves the amount paid out by them; it appearing that they were not interested in the consideration for which the indorsed note was given. *Ibid.*

4. The control of an execution against the maker and prior indorsers, as provided for by the Act of 1839, should be obtained under an order of Court whence the *fi. fa.* issued. The payment by the indorser need not be forced by levy; it may be voluntary, and yet in the eye of the law, it is a payment under the compulsion of legal process. *Ibid.*

5. As to notice to indorsers by Central Bank. See *Merchants' Bank vs. Central Bank*. 1 *Kelly*, 43. Also *McDougald vs. Central Bank*. 3 *Kelly*..... 191

6. A bill of sale to a slave, containing a warranty of soundness, is not negotiable under our Statute, by indorsement. *Broughton vs. Badgett*. 1 *Kelly*..... 77

7. Can an instrument under seal be transferred by an indorsement not under seal? *Quere. Ibid.*

8. The Act of 1799, has reference exclusively to *liquidated demands*, whether for money or other things, and applies to those instruments alone, which are for payment of an ascertained sum of money, or some specific article or articles of property. *Ibid.*

9. A note to be negotiable in Georgia, must be payable to the payee, or *his order, or assignee or to bearer*. Without such negotiable words, it is a valid instrument between the original parties, and is entitled to the allowance of *days of grace*, and may be declared on as a promissory note, but it cannot be negotiated so as to enable the assignee to sue upon it in his own name. *Reed, use of Holly, vs. Murphcy*. 1 *Kelly*, 237 See also, *Broughton vs. Badgett*. 1 *Kelly*..... 77

10. As between the holder of a banker's check and the indorser, it ought to be presented for acceptance with due diligence, but as between the holder and the drawer, a demand at any time before suit brought, will be sufficient, unless it appears that the drawee has failed, or the drawer in some manner has sustained injury by the delay. *Daniels vs. Kyle & Barnett*. 1 *Kelly*, 305. See also, *S. C.* 5 *Ga*..... 245

11. A makes his note payable generally to B, or bearer ; B transfers it to C by delivery, and C indorses it to D : C *Held*, to be an indorser and not a guarantor. *Cox vs. Adams.* 2 *Kelly*..... 159

12. In a suit by D, the indorsee, against C, the indorser, the possession of the note held to be *prima facie* evidence of the delivery of it by B to C. *Ibid.*

13. Each indorsement is a new contract, and the contract of indorsement, as to its nature, construction and interpretation, is governed by the *lex loci contractus* ; and the remedies thereon by the *lex fori*. *Ibid.* See also, *Levy vs. Cohen.* 4 *Ga.*..... 1

14. The indorsee of a negotiable promissory note, drawn in this State, payable in New York, and returned protested for non-payment, is entitled to charge *five per cent.* damages against the indorser, as provided by the Act of 1823, in cases of protested bills of exchange. *Howard vs. Central Bank.* 3 *Kelly*..... 378

15. The charter of the Insurance Bank of Columbus prescribes the mode in which contracts shall be executed to be binding on the company, viz : that they shall be signed by the president and countersigned by the cashier. In a suit, at the instance of the holder of a bill against the indorser on a bill drawn by the indorser himself, as president of the bank, and in his own favor, he cannot object to the regularity of the contract, nor is he protected on his indorsement by its want of conformity to the Statute. *McDougald vs. The Central Bank.* 3 *Kelly*..... 191

16. Where the indorsers of a promissory note resided in the County of Richmond, the one seven and a half, and the other twelve miles from the City of Augusta, and were in the habit of receiving their letters and papers at the Augusta post-office, at least once a week : *Held*, that notices of the dishonor of a note, deposited in the Augusta post-office, addressed to them, was sufficient to make them liable, although there was a post office at the Richmond Factory, nearer to them than the office at Augusta. *Walker et al. vs. Bank of Augusta.* 3 *Kelly*..... 495

17. The certificate of Notaries Public, *prima facie* evidence of the non-payment of the note, and of notice also, when so stated therein. *Ibid.*

18. Although a note, on its face, be negotiable and payable at Charleston, still, if it be indorsed in this State, and there is no evidence to show the understanding of the parties, that the undertaking of the indorser was to be performed in Charleston, the indorsement will be deemed a *Georgia*, and not a *Carolina* contract. *Levy vs. Cohen.* 4 *Ga.* 1

19. *Held*, that an indorser *in blank* on a promissory note which is abso-

lute, unconditional, and unrestricted on its face, cannot prove by *parol* that it was given for the purpose of being negotiated, or was intended to be negotiated at a chartered bank. *Stubbs vs. Goodall*. 4 Ga. 106

20. A note payable to B, and indorsed at the time of its execution by C, C is liable, as second indorser, at Common Law. *Collins vs. Everett*. 4 Ga. 266
21. And as surety, under the Act of 1826. *Ibid*.
22. Parol evidence inadmissible to show that he agreed to be liable as original promissor. *Ibid*.
23. After a dissolution, one partner cannot bind his co-partner by a new contract, as an indorsement, even though it be for a debt due by the partners before dissolution. *Humphries vs. Chastain*. 5 Ga. 166
24. If the holder of a bank check neglect to present the same for payment within a reasonable time, and the bank fail in the meantime, the drawer is discharged from liability, to the extent of the injury he has sustained by such failure. *Daniels vs. Kyle and Barnett*. 5 Ga. 245
25. The same doctrine applies to all holders, whether payees or transferees. *Ibid*.
26. The holder of a promissory note, who transfers it by delivery, for a valuable consideration, warrants by implication, unless otherwise agreed between the parties, that he is the lawful holder, and has a just and valid title to the instrument, and a right to transfer it by delivery. He also warrants, in like manner, that the instrument is genuine and not forged or fictitious, and that he has *no knowledge* of any facts which prove the instrument, if originally valid, to be worthless, either by the failure of the maker, or by its being already paid, or otherwise to have become void or defunct; and any *concealment* of these facts, on the part of the transferor of the note, operates as a *fraud* on the rights of the transferee, for which a Court of Equity will entertain jurisdiction to compel discovery and grant relief. *Winter vs. Bulloch*. 6 Ga. 230
27. Upon the transfer of a note payable to bearer by delivery, the transferor ceases to be a party to it, and is not generally responsible thereon to the transferee, or any subsequent holder. But if he undertake to guaranty the payment of the same, he will be liable on that special contract, and that is a proper subject-matter of set-off. *Orenshaw vs. Jackson*. 6 Ga. 509
28. A transfers a note, payable to bearer, to B by delivery, and says: "C, (the maker) although a poor man, is perfectly good for his con-

tracts, and if C is not good, I am good :” Held, that these sayings are admissible to support a plea of a promise and undertaking to guarantee the payment of the note. *Ibid.*

29. The purchaser of a note after due from an indorser who has paid it, cannot recover out of a prior indorser any more than his vendor paid upon it. *Bethune vs. McCrury*. 8 Ga..... 114

30. A note made payable at either of the banks in Macon, held to be within the proviso of the Act of 1826, which dispenses with demand and notice to charge an indorser. *Hoadly vs. Bliss*. 9 Ga..... 303

31. An indorser can waive demand and notice before the maturity of the note only. After its maturity, he can waive proof of demand and notice. *Ibid.*

32. The transfer of a negotiable note, upon which suit is pending, conveys such an interest in the judgment obtained thereon, as will enable the transferee to sue process of garnishment in his own name. *Dugas vs. Matthews et al.* 9 Ga..... 510

33. When a party, liable over as transferor to the transferee of a promissory note, is notified of a plea of failure of consideration, filed to a suit by the transferee thereon, the transferee is a privy, in law, to the judgment thereon, and is concluded thereby. And if, afterwards, the transferor is proceeding at Law to enforce securities against the transferee, taken in payment for the note, Equity will relieve by injunction and decree. *Bullock vs. Winter*. 10 Ga..... 214

As to CONTROL BY INDORSERS, see *Surety*. See next Division of this Title.
See, also, *Bills of Exchange* ; *Notice and Demand*.

III. OF THE EQUITIES BETWEEN THE PARTIES: WHEN SUBJECT.

1. A transfer of notes long after they become due, will not deprive the maker of any defence to which he would have been entitled, had they continued in the hands of the payee. *Crawford, Adm'r, &c. vs. Beal et al.* · *Dudley* 204

2. A note given for a consideration, in violation of public policy, is void as between maker and payee; but if indorsed before due, and without notice, in a suit by such innocent indorsee, the consideration will not be inquired into. *Poe vs. Justices, &c. Dudley* 249

3. The *bona fide* holder of a negotiable note, payable to bearer, for a valuable consideration, without any notice of the facts which impugn its

- validity, transferred before due, takes it unaffected by these facts.
Bond vs. Central Bank. 2 Kelly..... 102
4. The holder of a negotiable instrument, is *presumed* to be a *bona fide* holder for a valuable consideration, without notice. *Ibid.*
5. The extinguishment of a pre-existing debt, constitutes a valuable consideration for the transfer of a negotiable note; and the holder thus receiving it, before due, and without notice, is unaffected by the equities between the antecedent parties. *Ibid.*
6. The maker of a note, in an action by the indorsee, who received it *after* due, cannot set-off a demand against the payee, unless the subject of the set-off attaches to or is connected with the note itself.
Tinsley vs. Beall. 2 Kelly..... 135
7. A note transferred *before* due to a holder, without notice, as *collateral security* for an existing debt, is not liable to the equities existing between the maker and payee. *Gibson et al. vs. Conner.* 3 Kelly... 48
8. The *bona fide* purchaser of a negotiable security, before it is due, from one who has no title, acquires a title. *Matthews vs. Poythress.*
 4 Ga..... 287
9. What constitutes *mala fides*? *Ibid.*
10. How far public notice of the *loss* of a note will affect a *bona fide* purchaser. *Ibid.*
11. As a general rule, the holder of negotiable paper will be presumed to be a *bona fide* holder, and will not be bound to prove that he has paid value for it, until the other party shows a want or failure of consideration, or that the note had been lost or stolen before it came to the possession of the holder. *Nell vs. Snowden.* 5 Ga..... 1
12. A party who acquires title to a bill or note, before due, but with express notice of a defect or incumbrance, is so far identical with the previous owner, that his declarations or admissions, while owner, may be received in evidence against such party. *Glanton vs. Griggs.* 5 Ga..... 420
13. The assignee of a promissory note, not negotiable, takes it subject to all the equities which existed between the assignor and maker thereof, at the time of the assignment, and all equities which may attach in favor of the maker, before notice of the assignment. *Guerry vs. Perryman.* 6 Ga..... 119
14. Where, by a decree of a Court of Equity, a specific sum of money

was decreed to be due to the maker of an *unnegotiable* promissory note, by the payee thereof: *Held* that such decree could not be impeached by extrinsic evidence, so as to impair or defeat the equitable right of such maker, to set-off such decree for the *full amount* thereof, against such note in the hands of an assignee for a valuable consideration, but who had never given any notice to the maker of the note, of such assignment. *Ibid.*

15. The holder of a promissory note who transfers it by delivery, by implication warrants that he is holder, and has a valid title; also, that the instrument is *genuine*, and that he has *no knowledge* of any facts which prove the instrument, if originally valid, to be worthless, either by the failure of the maker, or by payment, or otherwise void or defunct. *Winter vs. Bullock.* 6 *Ga.*..... 220
16. One who buys a note, bill, or other negotiable security, *bona fide* and for value, *after it is due*, from one who has no title to it, acquires no title against the true owner. *Thomas, Adm'r, vs. Kinsey.* 3 *Ga.*.... 421

IV. OF NOTICE TO SUE.

1. The holder of a promissory note or other instrument, is bound to sue a *dormant* partner of the makers, not generally known as such, when notified to do so by the surety or indorser, under the Act of 26th Dec. 1831. *Howard vs. Brown, Adm'r.* 3 *Kelly.*..... 527
2. A judgment was recovered against the plaintiff, as the subsequent indorser, and was settled by him by giving a new note, and agreeing to pay the attorney's commissions upon the judgment, which was kept open as a lien therefor. In a suit upon the old note, by the plaintiff, against a prior indorser, it was *Held*, that the plaintiff became the holder thereof, *eo instanti*, upon his settlement of the judgment, so as to be affected by notice to sue the makers, notwithstanding the attorney's commissions remained unpaid, and the judgment continued open to secure them. *Ibid.*
3. Notice was given the holder to sue the maker; but before the expiration of the three months allowed by the Statute, the maker removed out of the State, so that no suit could be instituted against him: *Held*, that the holder has the whole three months allowed by the Statute, in which to sue, and that the removal of the maker was at the risk of the indorser, and not of the holder. *Ibid.*
4. Notice to the *Cashier* of the bank, by the surety, to sue the principal, is a sufficient notice to the bank, especially where it appears that the bank acted upon such notice. *Bank of St. Marys vs. Mumford and Tyson.* 6 *Ga.*..... 44

5. A bank, when *holder* of a promissory note, is within the provisions of the Act of 1831, authorizing sureties to give notice to sue. *Ibid.*
6. Where it is doubtful whether the surety intended to *request* the creditor to sue the principal as a matter of *favor*, or to *require* it as a matter of *right*, under the Statute, it is proper to submit it to the Jury to find from the facts, how the parties understood the matter. *Bethune, Adm'r, vs. Dozier.* 10 Ga..... 235

V. SUITS THEREON: AND HEREIN OF WHO MAY SUE: DEFENCES.

1. The maker of a promissory note cannot be sued with the indorser, out of his County. *Morris vs. McLain et al. Dudley*..... 172
2. To an action upon a note, the defendant will not be allowed to prove a partial failure of consideration. *Jordan vs. Adm'r of Jordan. Dudley.* 181
3. A purchaser of a special interest in land, who gives his note for the purchase money, and is in quiet possession of the land, shall not be protected from the payment of the note, from a mere apprehension of being disturbed at some future time. *Ibid.*
4. The title of a holder of a note, payable to bearer, or to order, and indorsed in blank, cannot be questioned in a suit in his name, unless the defence, as against the true owner, makes it necessary. *Nisbet vs. Lawson.* 1 *Kelly*..... 284
5. An agent of an Insurance Company may maintain an action in his own name, on a negotiable note belonging to the company. *Ibid.* See, also, *Field vs. Thornton.* 1 *Kelly*..... 306
6. The owner or holder of a negotiable paper, may bring an action upon it in the name of a person having no interest in it. *Field vs. Thornton.* 1 *Kelly*..... 306
7. As a general rule, it is true that suits should be brought in the name of the person having the *legal* interest in the contract; but in the case of negotiable notes, suits may be brought in the name of persons having no such interest; they may sue as trustee for the person having the real interest. *Ibid.*
8. The question of title in negotiable paper, is one which the defendant will not be permitted to raise, unless it is made to appear that it is necessary for the purposes of his defence. *Ibid.*
9. In a suit upon a note, appearing on its face to have been altered, the

- plaintiff is not required to explain the alteration, if it is declared upon *as altered*, and no plea of *non est factum* filed. *Tedlie vs. Dill*. 2
Kelly 131
10. In an action by an assignee, on the following instrument, "I agree to take of Burr, Mizell & Co. a fifty-saw cotton gin, cast-steel saws, fine teeth, and improved brush, nine inches in the circle; the gin to be delivered at my house by 1st September next. The said Burr, Mizell & Co. warrant the said gin to perform well in every respect, or they will make it do so at their own expense. For which I promise to pay Burr, Mizell & Co. or bearer, one hundred dollars, by 1st January, 1847:" *Held*, that failure of consideration might be pleaded and proved. *Hodges vs. Hall*. 5 *Ga.*..... 163
11. In a suit upon negotiable paper, the defendant will not be permitted to raise the question of *title*, unless it is necessary for his defence. *Hall, et al. vs. Carey, Assignee*. 5 *Ga.*..... 239
12. A, the debtor of B, upon a negotiable note not due, is summoned by C, the creditor of B, to answer upon process of garnishment; B subsequently transfers the note to D, with express notice of the pendency of the garnishment: *Held*, that judgment against A, in favor of the attaching creditor, may be pleaded in bar of the suit of D, the assignee of the paper. *Glanton vs. Griggs*. 5 *Ga.*..... 424
13. A note made payable to A, "lawful attorney of B," is payable to A, and may be sued on by him or his administrator, after his decease. *Austell, Adm'r, vs. Rice et al.* 5 *Ga.*..... 472
14. An infant, by *prochein ami*, may sue upon a note made payable to itself. *Ibid.*
15. A declaration on notes payable in specific articles, is bad, without an averment of the value of those articles, at the maturity of the notes. *Phillips vs. Dodge*. 8 *Ga.*..... 51
16. In a suit on a negotiable promissory note, the defendant will not be permitted to question the plaintiff's title to the paper, unless it is made to appear that it is necessary for the purpose of his defence. *Varner vs. Lamar*. 9 *Ga.*..... 583

VI. PARTIES, WHEN WITNESSES.

1. A party to a negotiable instrument may testify to facts which do not prove it to have been originally void, as payment, &c. *Wendell vs. George*. *R. M. Charl.*..... 51

2. The maker of a note, (who is released,) is a competent witness to prove usury in its consideration, in a suit by an indorsee against an indorser. *Winkler vs. Scudder*. 1 *Kelly*..... 128
3. In a suit against the surety alone, the principal is interested to the extent of the costs; and therefore, is not a competent witness for the surety, unless released from liability for such cost. *Rackley vs. Sanders & Sanders*. 1 *Kelly* 258
4. The indorser of a note is an incompetent witness, on the ground of interest, to prove the payment of money, by him, to the attorney of the plaintiff, in an action against the attorney, unless released. *Nisbet vs. Lawson*. 1 *Kelly*..... 282
5. In an action against the surety to a note, to which the defence was usury, the maker, (when released,) is a competent witness for the defendant. *Barnett et al. vs. Troutman*. 9 *Ga*..... 36

PUBLIC AGENTS. See *Principal and Agent, IV*.

PURCHASERS. See *Sales*.

QUO WARRANTO. See *Corporations, IV. 1*; *Mandamus, 16*.

RAILROADS AND PLANK ROADS.

1. Where a Railroad Company claimed the right to deviate from the original route surveyed for their road, and specially designated in a deed of conveyance made by the plaintiff to them, granting the right of way through his land, in locating their road, under the clause in the deed containing the following words: "with liberty to make such slight alterations in the route now surveyed, as not materially to change the route surveyed," it was *Held*, in a controversy between the landholder and the company, as to whether the road was located on the land conveyed by the deed of the plaintiff, that the latter might give in evidence on the trial, the situation, value and condition of the land, over which the original route was surveyed and described in the deed, as well as that over which the road was finally located, for the purpose of showing the materiality of the variation, as affecting the rights of the respective parties. *Lessee of Carr vs. The Ga. R. R. & Banking Co*. 1 *Kelly*..... 530
2. When a Statute granting a charter to a railroad company provides for the assessment of damages in a summary way, to be paid to the

landholder whose private property shall be taken for the use of the road, there being no negative words in the Statute, express or implied, the landholder whose property is thus taken, is not deprived of his Common Law remedy to recover damages therefor; the Statute creates no new right, and being in derogation of a Common Law right, must be strictly construed. The summary remedy given by the Statute is *cumulative* only. *Ibid.*

3. Private property cannot be taken for public use without a just compensation; and where a railroad charter provides that adequate security shall be given to the land-holder, whose property shall be taken for the use of the road, for the payment of such damages as shall be assessed in the manner pointed out thereby; no title to the land thus taken vests in the company, nor can the company appropriate the same to the *exclusive* use of the road, so as to defeat the right of the land-holder to maintain trespass or ejectment therefor, until such adequate security shall be given; and it is incumbent on the company in their plea, to allege and to prove at the trial, that the provisions of their charter in that respect, have been strictly complied with, before the land-holder can be deprived of his title to his property. *Ibid.*
4. The XIth section of the charter of the Monroe Railroad & Banking Co. gives to bill holders a paramount lien for the payment of their bills, upon that part of the road only which was built by the company. *Collins vs. The Central Bank et al.* 1 *Kelly*..... 455
5. Such portion of the road as was built by the contractors under a mortgage thereon, to secure them for the work done, and materials and equipments furnished, is liable to them, and their lien is paramount to that of bills or notes. *Ibid.*
6. The vendor's lien applies to lands, the title to which has been transferred by operation of law, under a railroad or other corporation charter, as well as to voluntary sales by the land-owner. *Mims vs. Macon & Western Railroad Co.* 3 *Kelly*..... 341
7. It is not extinguished by the acceptance of the certificate of deposit of the cashier of the corporation, for the valuation of his land, as assessed by the commissioners; provided the money is not paid when called for, owing to the insolvency of the company. *Ibid.*
8. Where the contractors on a railroad stipulated with the Company, to finish their work by a certain time, and the company agreed to furnish the material along the line; and it was farther agreed, that all matters of difference arising under the contract, should be determined by the Engineer of the Company, without farther recourse or appeal: *Held*, that Equity had jurisdiction of a claim for *time lost* through the breach of the contract on the part of the company, notwithstanding

the Engineer had refused to allow the claim—the bill charging that the Engineer was a stockholder to the amount of \$10,000, a fact unknown to the contractors at the time of the submission. *Milnor & Co. vs. Georgia Railroad Co.* 4 Ga..... 325

9. The judgment of the Supreme Court, in "*Collins vs. The Central Bank*," (1 *Kelly*, 435,) did not reverse, *in toto*, the decree of the Circuit Court, settling the relative dignity of the claims upon the fund arising from the sale of the effects of the company. *Woodward vs. The Central Bank et al.* 4 Ga..... 323
10. The statutory lien of bill-holders, under the charter, attaches equally upon *all* the property and effects of that company. *Ibid.*
11. In the construction of Statutes in derogation of common right, and in favor of corporations or particular persons, care should be taken not to extend them beyond their express words or their clear import. *The Mayor, &c. vs. The Macon & Western Railroad Co.* 7 Ga..... 221
12. Where a railroad company has, by their charter, the *exclusive* right to carry and transport persons, produce, merchandize and all other things over their road from Atlanta to Macon: *Held*, that their charter did not confer the right to engage in the business of transporting produce through the City of Macon, across the Ocmulgee bridge from their depot to another railroad depot, for the accommodation of their customers. *Ibid.*
13. The Macon & Western Railroad Co. took on board their cars, the slave of H, having a general pass, and without the knowledge and consent of H, to transport him to a given point, for the usual fare for negroes: *Held*, that this was a conversion of the slave, and that the company are liable for all the injuries which he received, whether they occurred by the negligence of the company or otherwise. *The Macon & Western Railroad Co. vs. Holt.* 8 Ga..... 157
14. A plank road company, under authority from the Legislature, to construct a plank road between two designated points, have no right to appropriate to that purpose the whole of the public highway, without express authority in their charter. *The Justices, &c. vs. The Grif-fin, &c. Plankroad Company.* 9 Ga..... 475
15. Where the charter authorizes the company to locate their road upon any part of a highway when it becomes necessary so to do: *Held*, that in such a grant, the Legislature did not intend that they should be authorized to appropriate the whole course of any highway. *Ibid.*
16. Such a grant, whilst it is to be strictly construed, is to be interpreted so as to secure to the company beneficial results. The necessity

contemplated by the Legislature, is not such a necessity of using a highway, as, without such use, would defeat the enterprise; but a reasonable necessity—as, for example: to avoid constructing a costly bridge over an almost impassable swamp, or an inconvenient or wide departure from the proper direction of the plank road. *Ibid.*

17. The company are to judge of the necessity in the first instance, subject to be finally controlled by the action of the Courts; and whether the necessity exists or not, is a question of fact, to be determined on the production of evidence. *Ibid.*

18. In cases where such necessity exists, the company are bound by their charter, to pay the damages resulting from the appropriation of the highway, to be ascertained in the manner pointed out by the charter, and any departure from the directions therein contained, or fraudulent or collusive acts on the part of the company, in relation to the assessment, will vitiate the whole proceeding, and subject them to injunction. *Ibid.*

19. *Held*, that under the charter of the Griffin & West Point Plankroad Company, and under the general law, the Inferior Court of Pike County, may rightfully institute suit in Equity, to restrain them from violations of their charter. *Ibid.*

20. Some general remarks on plankroads. *The Com. &c. 580th District vs. The Griffin, &c. Plankroad Co.* 9 Ga..... 487

21. Is a railroad subject to levy and sale at Law? *Quere. The Macon & Western Railroad Company vs. Parker.* 10 Ga..... 377

22. Where there are sundry *fi. fas.* against an insolvent railroad company, threatening to seize and sell the road, with its equipments—extending one hundred miles in length, through six different Counties—Equity will take jurisdiction of the matter: direct a sale of the entire property for the benefit of all concerned; and distribute the fund according to the practice and usage in Chancery, in a creditor's suit against executors and administrators. In such a case, no other Court but that of Chancery, possesses adequate jurisdiction to reach and dispose of the entire merits. *Ibid.*

23. To allow the road to be cut up into fragments, and separate portions sold at different sales, in the different Counties through which it passes, to different purchasers, would not only sacrifice the rights and interests of creditors, but defeat the objects and intentions of the Legislature in granting the charter. *Ibid.*

RAPE.

1. An indictment for an assault with intent to commit a rape, need not denominate the offence a misdemeanor. *Camp vs. The State.* 3 *Kelly.* 419
2. On such an indictment, evidence that the person charged to have been injured, is in fact, a common prostitute, or evidence of reputation that she is a woman of ill-fame, is admissible to impeach her credibility. *Ibid.*
3. A rape may be committed upon an infant. *Stephen, (a slave,) vs. The State.* 11 *Ga.*..... 225
4. A child *under* ten years of age cannot consent to carnal intercourse so as to rebut the presumption of force. *Ibid.*
5. Will not the same presumption be made in favor of one *over* ten, who is still a child in stature, constitution, and physical and mental developments? *Query. Ibid.*

RECEIPT. See *Evidence, Release.*

RECEIVER. See *Banks and Banking.* 7, 44, 45.

RECOGNIZANCE. See *Bonds, I.* 9, 10, 12. *V. 2. Sci. fa.*

RECORD.

1. It is not necessary that the minutes of the Court should be signed by the presiding Judge, in order to constitute a term, especially where such Judge is removed from office for malconduct. *T U. P. Charl..* 9
2. The records and judicial proceedings of the Courts of South Carolina, when legally authenticated, are entitled to the same faith and credit in Georgia, as they have by law or usage in Carolina. *Harris & Co. vs. Williams. Dudley*..... 199
3. The motion docket is not a record, the entries on it are mere memoranda of the Judge, kept by him for his own convenience. *Bryant, Guardian, et al. vs. Owens and Wife.* 1 *Kelly.*..... 367
4. The entry of "parties made" on the motion docket, is insufficient

to make the representatives of a deceased plaintiff or defendant, parties to the cause. There should be a judgment rendered and entered on the minutes. *Ibid.*

5. An entry on the motion docket, is no part of the record. *Johnson vs. Bemis.* 4 Ga..... 157
6. A defective record cannot be supplied by consent, in the Supreme Court. *Baldwin vs. Lee.* 7 Ga..... 136

As to AMENDMENT OF RECORDS. See *Amendment.*

As to RECORDS OF DEEDS AND MORTGAGES. See *those titles.*

As to WHEN, OR HOW EVIDENCE. See *Criminal Law, II. Evidence, III.*

REGISTRY. See *Deeds, III.; Mortgages, II.; Wills.*

RELEASE.

1. Where an agent had lost the money of his principal, at faro, and an action for money had and received, was brought by the principal, and the agent offered as a witness: *Held,* that a release, officially attested by Notaries, is sufficient, without its being proved by them as witnesses. *Allen vs. Lacy et al. Dudley*..... 81
2. A general release or receipt, in full of all demands, will not extend to such claims as are held by the releasor as executor. *Wiggins vs. Norton. R. M. Charl.*..... 15
3. *In Equity*, the payment by, or the release and discharge of, *one* joint debtor, will not operate as a discharge of the debt as to *all*, unless the intention of the parties, and the justice of the case, require such a construction of the payment. *Norris vs. Ham et al. R. M. Charl.*... 267
4. A receipt may be explained by parol testimony, when there has been imposition practised by the giving of it; and any facts may be proved at Law, which, if true, would entitle the party to relief in Equity. *Tarver vs. Rankin. 3 Kelly*..... 215
5. Where a guardian pleads in bar of an account, the receipts of his wards as evidence of a final settlement: *Held,* that his admission in his answer in support of his plea, that he had not made regular re-

turns to the Court of Ordinary, was such a circumstance as cast suspicion upon the fairness of the settlement and would avoid the plea. *Briers vs. Hackney and others.* 6 Ga..... 419

See *Evidence, II.*

REMAINDER AND REVERSION.

1. The devise of an absolute estate, *in fee*, may be qualified by a subsequent limitation on contingency in the same will; but if such a contingency be an indefinite failure of issue, it is void, and the absolute estate vests in the first devisee. *Mayer vs. Wiltberger.* Ga. Dec. part II..... 20
2. Where a limitation is on a *definite* failure of issue, the intention to make a subsequent limitation on an *indefinite* failure, must be manifest, or the Court will not so construe it after verdict. *Ibid.*
3. A limitation to J. S. as "survivor," shows an intention to make the failure of issue definite. *Ibid.*
4. A limitation on a *legal* contingency which has happened, will not be defeated by a subsequent limitation on an *illegal* contingency. *Ibid.*
5. A remainder in slaves, to take effect and be enjoyed after a life estate, cannot be created by parol, in favor of persons not in being at the time the property is delivered to the tenant for life. *Kirkpatrick, Guardian, vs. Davidson.* 2 Kelly..... 301
6. The rule in Shelly's case, applies only where the estate to the ancestor and to the heirs, is of the same kind; it applies to *legal estates* and to *trusts executed*, but not to *trusts executory*, when it is the intention of the testator that it shall not apply; it applies to *personal* as well as *real* property. *Edmondson and Wife vs. Dyson.* 2 Kelly..... 312
7. R. F. by his will, bequeathed all his property to his wife, during her life or widowhood. "In case she should die or exchange her situation by marriage," then a sale to be made of all his property, and the proceeds to be equally divided among his children: *Held*, that the children took a *vested* remainder at his death. *McGinnis, Adm'r, vs. Foster, Ex'r.* 4 Ga..... 377
8. A bequest of personalty, to testator's "wife during her natural life, and at her death to be equally divided between all my surviving chil-

dren, and the legal representatives of such as may be deceased," creates a *vested* remainder in the children living at the time of testator's death. *Vickers vs. Stone*. 4 Ga..... 461

9. In a gift to M. S. D. for the life of W. J. D. then to her *child*, or *children*, living at her death, to be *divided*, *share and share alike*, to him, her or them, his, her or their *executors*, *administrators* and *assigns*: *Held*, the children would take as *purchasers*. *Dudley vs. Mallery*. 4 Ga. 52
10. Where there is an *express* estate created, it cannot be *implied* that a different estate was *intended*. Is not the doctrine of *implied* estates confined to wills? *Quere. Ibid.*
11. M. D. made a conveyance in these words: "and if it should happen that M. S. D. should die, *leaving* no child or children by W. J. D. then in trust for the maintenance and support of said W. J. D. and his child or children." W. J. D. died before M. S. D.: *Held*, that the *fee* never vested in W. J. D. *Ibid.*
12. The Court will take hold of any words, explanatory of the technical terms which would create an estate tail, to effectuate the intention of the testator. *Ibid.*
13. A remainder may be created in personalty by deed, reserving a life estate to the grantor or any one else. *Robinson vs. Schly and Cooper*. 6 Ga..... 515
14. The assent of the executor to a legacy may be implied from possession of the property by the legatee, and assent given to the tenant for life, will enure to the benefit of the remainder-man *in fee*. *Jordan vs. Thornton et al.* 7 Ga..... 517
15. By deed, a *feme sole*, in contemplation of marriage, conveyed her estate to trustees, for her sole use, until marriage, to the joint use of herself and her husband during their joint lives; if she survives, to her and her heirs; if he survived, to him and the children of the marriage, if any, jointly, during his life; if no children, then to him for life; and there being issue or children of the marriage, to them and their heirs forever; and there being no children or issue, from and after the death of the husband to her right heirs. The wife died before the husband, leaving children who died before the husband: *Held*, that a life estate was conveyed to the husband and children, with vested remainder in fee, to the children; and that at the death of the husband the property went to the heirs of the children, and not to the right heirs of the settler. *Holcombe vs. Tufts and another*. 7 Ga.... 538
16. A remainder in slaves cannot be created by parol. *Maxwell vs. Harrison*. 8 Ga..... 61

17. A limitation of a promissory note in remainder, by deed or will, is valid. *Broughton, Adm'r, vs West.* 8 Ga..... 248
18. Where the tenant for life in certain slaves, intermarried, and her husband sold ten of them, and then combining with the purchasers to defraud the remainder-men, the slaves are removed beyond the limits of the State, and re-sold: *Held*, that in such a case, Equity would compel the husband and purchasers, on a bill *quia timet*, to give bond in a sufficient penalty, with security, for the delivery of the negroes, at the termination of the life-estate, and that altogether regardless of their solvency or insolvency. *Riddle et al. vs. Kellum et al.* 8 Ga. 374
19. An estate in remainder, in slaves, cannot be created by parol or verbal gift. *Yarborough et al. vs. West.* 10 Ga..... 471
20. But a remainder in trust may be proven by a declaration of the trust in writing, made by the trustee, setting forth the nature and object of the trust clearly and distinctly. *Gordon vs. Green.* 10 Ga..... 534
21. It is only necessary for remainder-men and reversioners to state their case in the terms of the Act of 1830, in order to entitle them to the remedy therein provided; they need not specify in their bill the threatened wrong or probable ground of possible injury, to enable them to obtain the assistance of the Court to avert the peril. *Jackson & Lester vs. Waters, Adm'r of Anna Hackett, deceased.* 10 Ga..... 546
22. The defendant, under the Act of 1830, may, by answering, controvert the title of the complainant, and if the decree of the Jury be against its validity, he will be released from his obligation for the forthcoming of the property; otherwise, the security which he has given will continue. *Ibid.*
23. The Act of 1830, to preserve the rights of remainder-men and reversioners, contemplates that the bill should be filed and the security given in the County where the person resides, who has the possession or control of the property, and unless special cause exist, the jurisdiction cannot be transferred. *Ibid.*
24. The fact that different portions of the property claimed, are held in several Counties, is not sufficient, especially where the title is not the same through which the respective owners derive their right. *Ibid.*

See *Deed; Devise and Legacy; Will.*

RENT. See *Landlord and Tenant.*

RES GESTÆ. See *Criminal Law, II.; Evidence.*

RESIDENCE.

1. To constitute a legal residence, there must be the concurrence of an actual residence, and an intention to remain, which is matter of fact for a Jury to decide, not alone from express words, (which might not at all times be proper testimony,) but from attendant circumstances showing an *animus manendi*. *Lamar vs. Mahoney. Dudley*..... 93

See *Pleading, V.*

RETAIL LICENSE. See *License*.

RETRAXIT. See *Practice, II. 29, 30.*

RETROSPECTIVE LAWS. See *Constitutional Laws, III.*

REVIEW, BILL OF. See *Equity, III. d.*

RIVERS AND RIPARIAN RIGHTS.

1. Riparian proprietors, who own land on both sides of a water course, above ebb and flow of tide water, have a title to the land covered by the water, to the thread or centre of the stream, as it is accustomed to flow in its natural channel. *Hendricks vs. Cook. 4 Ga*..... 241
2. Each riparian proprietor has the right to a reasonable use of the water, as it flows along the natural channel of the stream, for domestic, agricultural and manufacturing purposes; provided, in so using it, he does not *prejudice* or injure the rights of the other proprietors. *Ibid.*
3. Prior occupation of the water in a stream, by one riparian proprietor, for the purpose of turning his mill, does not give him the right to divert the water from the land of the proprietor above, nor to throw the water back upon him in the channel of the stream, without a grant or license to do so, from such proprietor, or an enjoyment of such easement, for such a length of time as will give a right, under the Statute of Limitations. *Ibid.*
4. Where the plaintiff and defendants were riparian proprietors, and the defendants erected a mill-dam at a place where they owned the land

on both sides of the stream, but caused the water to flow back in the channel of the stream ten or eleven inches in height, whereby a valuable mill-shoal of the plaintiff was drowned to that extent: *Held*, that this was an invasion of the plaintiff's right of property, and that he was entitled to maintain an action for the *protection of that right*, and to recover nominal damages; although the water was not thrown out of the banks of the creek, and no perceptible damage could be shown. *Ibid*.

5. *Held*, also, that the plaintiff was entitled to show to what extent he had been damnified in consequence of the back-water, although the same was not thrown out of the natural banks of the stream. *Ibid*.
6. There are three kinds of rivers. 1. Such as are wholly and absolutely private property. 2. Such as are private property, subject to the servitude of the public interest by a passage upon them. 3. Rivers where the tide ebbs and flows, which are called arms of the sea. *Young vs. Harrisons. 6 Ga.*..... 130
7. The owner of land on the banks of a river has not, as a matter of right, and merely because he is owner, the privilege of keeping a public ferry. His right to do so can only arise by grant, actual or implied. *Ibid*.
8. The State has a right to erect bridges whenever and wherever the Legislature may deem them necessary for the convenience of the public. *Ibid*.

ROADS. See *Railroads and Plank Roads; Ways*.

SALE.

- I. GENERALLY: AND HEREIN OF BONA FIDE PURCHASERS WITHOUT NOTICE.
- II. SHERIFFS' AND OTHER JUDICIAL SALES.

As to FRAUDULENT SALES, see *Assignments, III. Fraud, I. II.*

I. GENERALLY.

1. A sale of stock by a portion of the stockholders to the rest, is not such a sale by the *corporation*, as will make the purchasers liable to the creditors of the company. *Berry et al. vs. Matthews et al. 1 Kelly.. 523*

2. Between purchasers of personal property, the elder title must prevail unless infected with fraud. *Butler & Co. vs. Roll. Ga. Dec. part I..* 37
3. When a chattel is sold, on condition that the title is not to vest until paid for, and time is given for the payment, the property is not changed until the payment, though the possession is delivered at the time of the sale. *McBride vs. Whitehead. Ga. Dec. part I.....* 165
4. A *bona fide* purchaser acquires no higher estate by purchase, than that of his vendor. *Mayer vs. Wiltberger. Ga. Dec. part II.....* 20
5. An agreement to sell lands will not be held fraudulent against a subsequent purchaser with notice, unless the party said to be defrauded, has taken steps to avoid it in Equity. *Wagnor and Godwin vs. Lewis. Ga. Dec. part II.....* 205
6. A bond for titles will be held good in Equity against a subsequent purchaser, with notice of the bond. *Ibid.*
7. A purchaser of lands not in the possession of vendor, is deemed to have notice of the tenant's claim. *Ibid.*
8. A purchaser, *without notice* of any fraud or defect in the title, who purchases from one affected *with notice*, will be protected. *Truluck et al. vs. Peeples et al. 3 Kelly.....* 448
9. So a purchaser *with notice*, who purchases from one *without notice*, will be protected; for otherwise, a *bona fide* purchaser might be deprived of the benefit of selling his property for its full value. *Ibid.*
10. If A make two propositions to buy goods of B, one in writing, the other in parol, B has the right to elect which he will accept, and if he accepts the written one, the writing is the only evidence of the contract. *Woolbright vs. Sneed. 5 Ga.....* 167
11. If the letter contains alternative propositions, the vendor has the right to elect, and an issue may be made before the Jury, as to which he did elect. *Ibid.*
12. Where the undertakings of the parties to a contract are concurrent, and one is ready and willing, and offers to perform, and the other is not; the first is discharged from performance, and may maintain an action against the other. *Biggers vs. Pace. 5 Ga.....* 171
13. A demand of goods sold at the time and place specified, is *prima facie* evidence of the readiness of the purchaser to pay for them. *Ibid.*
14. Where goods are to be delivered and money paid, the *actual* tender

- of the money, will be dispensed with by the repeated declarations of the seller, that he will not receive it. *Ibid.*
15. Notwithstanding the title may have passed from the seller to the buyer, yet, if the former will not surrender the goods, the latter may either bring *trover* for them, or else *case*, for the damage, from failure to deliver. *Ibid.*
16. A exposed certain slaves at public auction, which were knocked off to B. B failing to comply with the terms of sale, agreed in writing, that the negroes might be re-sold, at his loss and expense: *Held*, that to charge B, A would have to show that the second sale was consummated: *Held* also, that B was liable for the difference in the two sales, notwithstanding A refused to let him have one of the negroes bid off by him, at the second sale, it appearing he was re-sold the same day, for the same price. *Hicks vs. Ayer.* 5 Ga..... 298
17. Where a tract of land was devised by a testator, and subsequently sold by his son, purporting to be agent, who gave a bond as agent, and after his death, the son, as executor, made titles: *Held*, that the devise, under the will, was not defeated by such sale, without showing some authority from the father to the son, to make such sale, as his agent. *Beal et ux vs. Crafton.* 5 Ga..... 301
18. Possession retained by the vendor after an absolute sale of real or personal property, is *prima facie* evidence of fraud, which may be explained; and after the possession is proven, the burthen of explaining it, rests upon those who claim under the sale; and the rule is applicable to voluntary conveyances and to sales for valuable consideration. *Fleming, Guardian, vs. Townsend.* 6 Ga..... 103
19. *Purchasers* are not embraced in the terms of the Statute 13th *Eliz.*; nor is *personal property* embraced in the terms of 27th *Eliz.*; but purchasers fall within the spirit of 13th *Eliz.* and personal property within the spirit of 27th *Eliz.* *Ibid.*
20. Upon Common Law principles, a voluntary conveyance is void against subsequent *bona fide* purchasers, for value, without notice. *Ibid.*
21. *Notice* to the purchaser must be *actual*. The registration of the conveyance is not such notice as will deprive him of the benefit of Statute 27th *Eliz.* *Ibid.*
22. Sale of land under an outstanding incumbrance against the vendor, is an eviction in judgment of law; and the vendee is entitled to have the contract rescinded, and the notes given in payment cancelled. *Martin vs. Atkinson.* 7 Ga..... 228

23. A vendee who takes up an outstanding incumbrance to protect his title, is entitled only to be refunded the amount paid out. *Ibid.*
24. A vendee who is legally evicted, and who re-purchases the property, is in under a new and distinct title, and the price last paid is no criterion of damages for the injury he has sustained, on account of the failure of his vendor's title. *Ibid.*
25. A vendee legally evicted of land, by judicial sale, under an execution against the vendor, is entitled to recover of the vendor the value of the beneficial and permanent improvements put upon the premises, over and above the rents and profits. *Ibid.*
26. A *bona fide* purchaser of land, without notice of any fraud or defect in the title, from one affected *with notice*, will be protected. *Herndon vs. Doe ex dem. Kinball.* 7 Ga..... 432
27. Where, by marriage contract, a slave is conveyed to a trustee, for the use of the wife for life, and to the offspring of the nuptials in remainder; and subsequently to the death of the wife, and during the infancy of the child who was born of the marriage, the slave was sold by the father, to a *bona fide* purchaser, without notice: *Held*, that the issue of marriage, upon coming of age, can recover the property from the remote grantee of the first purchaser, the vendor having no authority to sell, being neither trustee to the wife nor guardian to the child. *Papot vs. Gibson.* 7 Ga..... 533
28. The power of a trustee over the legal estate or property vested in him, properly speaking, exists only for the benefit of the *cestui que trust*. It is true, nevertheless, that as the legal owner, he may do many acts to the prejudice of the *cestui que trust*. He may even dispose of the estate or property to a *bona fide* purchaser, for a valuable consideration, without notice of the trust, so as to bar the interest of the *cestui que trust* therein. *Ibid.*
29. Where a *bona fide* purchaser, for a valuable consideration, without notice, is concerned, Equity will not interfere to grant relief in favor of a party having the legal title. For where the equities are equal, a Court of Equity will not interfere between the parties. And such a purchaser has as high a claim to assistance and protection, as any other person can have. *Ibid.*
30. But in a Court of *Law*, the better legal title must of course prevail. *Ibid.*
31. A conflict between the equities of a *bona fide* purchaser and a *volunteer*, can only arise where both parties claim under the same grantor. *Whittington vs. Doe ex dem. Wright.* 9 Ga..... 23

32. By the Common Law, unless there is an express agreement to the contrary, the cost of the conveyance falls upon the vendee of land. *Winter vs. Jones.* 10 Ga..... 190
33. Where H sold to A, a town lot, with a restriction that it should not be used as a tavern: *Held*, that the restriction was valid. *Holmes vs. Martin.* 10 Ga..... 503
34. A general conveyance may be limited by restrictive words in the same instrument. *Ibid.*
35. It is competent for the vendor to convey the fee to the vendee, and reserve certain rights to himself, his heirs and assigns. *Ibid.*
36. A complainant who relies for relief upon a tender, must allege all the facts substantially, which are necessary in pleading a tender at Law. *McGehee and another, Executors, vs. Jones.* 10 Ga..... 127
37. A purchaser of land who is in possession cannot have relief in Equity, against the payment of the purchase money, upon the mere ground of a defect of title before eviction. *Ibid.*
38. If he is in possession under a deed with covenants of warranty, he must resort to his covenants; if under a bond for titles, he must resort to his bond. *Ibid.*
39. If, however, the obligor is insolvent or without the jurisdiction of the Court, and there is no property within the jurisdiction, which would be liable to the satisfaction of his damages, and there is an outstanding title paramount to his, the purchaser will be entitled to relief against the payment of the purchase money, to the extent of his damages before eviction. *Ibid.*
40. The insolvency or non-residence must be distinctly alleged, and the defect of title, with every other fact necessary to enable the Court to decree on the title and assess the damages. *Ibid.*
41. The title of a *bona fide* purchaser without notice of prior voluntary conveyance, is good. *Fowler vs. Waldrip.* 10 Ga..... 350
42. To defeat the title in favor of the voluntary conveyance, notice at the time of the purchase must be brought home to the purchaser. The registry of the deed is not such notice. The notice must be actual and not constructive. *Ibid.*

See *Administrators, &c.* 2 to 6. *Covenant. Warranty.*

II. SHERIFF'S AND OTHER JUDICIAL SALES.

1. As to sales by administrators and executors. See *Title, Administrators, &c. III.*
2. It does not lie in the mouth of a purchaser at Sheriff's sale, with full and explicit knowledge of a lien, to contest its validity or to claim exemption from its operation. *Per LUMPKIN, J. Tuttle vs. Walton.*
1 *Kelly*..... 53
3. A Sheriff may sell the undivided interest of the defendant in negroes and other personal property, and the purchaser at such sale, becomes a tenant in common with the other co-tenants. *Leonard vs. Scarborough and Wife.* 2 *Kelly*..... 76
4. Under the Act of 1833, requiring Sheriffs and Coroners to put purchasers at Sheriff's sales in possession of lands: *Held*, if possession be not given immediately, or before the next term of the Court, or before the officer making the sale goes out of office, that it can only be done under an order of the Court, with notice to the tenant. *Chambers vs. Collier.* 4 *Ga.*..... 193
5. When the purchaser enters into a subsequent agreement with the defendant in execution, whereby he is suffered to remain in possession, he is considered as having waived his statutory right; and he cannot, upon the failure of the defendant to comply with his contract, two years and eight months afterwards, call on the officer to put him in possession. *Ibid.*
6. Where a purchaser of a tract of land, at Sheriff's sale, refuses to comply with the terms of sale, and the same was re-sold for less money, a Court of Equity will not entertain a bill for specific performance of the sale, at the instance of the defendant, but will leave him to the remedy provided by the Act of 1831. *Orr vs. Brown et al.* 5 *Ga.*..... 400
7. Where a bill seeks to set aside a Sheriff's sale, on the ground of fraud by the purchaser, and to enjoin the Sheriff from making a title to him, some *specific fraudulent act*, on the part of the purchaser, must be charged. A general allegation of fraud will not be sufficient. *Ibid.*
8. Where a creditor, who is the mortgagee, forecloses his mortgage, and purchases the mortgaged property at Sheriff's sale, under it, and suffers the property so purchased to remain in the possession of the mortgagor, after the sale, such retention of possession by the mortgagor is a badge of fraud as against other judgment creditors. *Williams vs. Kelsey & Halsted.* 6 *Ga.*..... 365

9. In order to prove the advertisement of a Sheriff's sale, in one of the public gazettes of this State, as required by law, the production of the newspaper in which the advertisement was published, is the best evidence; but if that cannot be done, in the exercise of ordinary diligence, then a copy taken from the paper of file in the publisher's office, verified by the oath of the publisher, is admissible. *Schley vs. Lyon and another, Trustees.* 6 Ga..... 530
10. Where one buys land at Sheriff's sale, upon which there is a lease from the defendant in *fi. fa.* older than the judgment, and, at the time of the sale, the lessee has not entered into possession, he buys it subject to the right of entry and user, under the lease. *Field vs. Howell.* 6 Ga..... 423
11. Where a Sheriff sells land under execution, and goes out of office before executing title to the purchaser, his successor in office may execute a title to such purchaser, without an order of Court. *Fretwell vs. Doe ex dem. Morrow.* 7 Ga..... 264
12. Where a Constable levies a Justice's Court *fi. fa.* on land, and delivers the same over to the Sheriff, for the purpose of sale, as provided in the Act of 1811, such Sheriff is lawfully seized of the land, to sell the same and to convey title to the purchaser thereof. *Ibid.*
13. The Act of 1823, which authorizes the Sheriff to place the purchaser of real estate in possession, does not justify the officer in dispossessing any other person but the defendant in execution, his heirs or tenants. *Bethune vs. Wilkins and another.* 8 Ga..... 118
14. Where a Sheriff sold negroes under execution at a Sheriff's sale, and delivered one of the negroes to the purchaser, with the understanding that the Sheriff was to call at a certain bank the next morning and receive a check for the purchase money; when the Sheriff called, the check was refused, under instructions from the purchaser, because the negro had runaway or been carried off the night before: *Held*, that the Sheriff was liable to be ruled, at the instance of the defendant in execution, for the surplus of the sale after paying the *fi. fas.*: *Held, also*, that the delivery of the slave to the purchaser, under the circumstances, was a matter exclusively between the Sheriff and the purchaser, with which the defendant had no concern, although her agent was present when the arrangement was made. *Davis vs. Irwin.* 8 Ga.. 153
15. Neither are Sheriffs, executors or other officers of the law, and trustees, liable for the title or soundness of property sold by them at public sale, unless upon their own express warranty, or where fraud exists. *Worthy et al. vs. Johnson et al.* 8 Ga..... 236
16. Neither Sheriffs, nor executors or administrators, can bind the exe-

cution debtor, or the estate of their testator or intestate, by any covenant respecting the property sold, or any other contract originating with themselves and unauthorized by law. *Ibid.*

17. All such covenants are personal, merely, if it can be plainly inferred that they intended so to bind themselves. *Ibid.*

18. When, by a special Act, the Sheriff is authorized to advertise his sales in a paper published in the County, it is not necessary to advertise at three of the most public places in the County to make the sale legal. *Mapp and another vs. Thompson.* 9 Ga..... 42

19. A Sheriff cannot purchase at his own sale, neither for himself nor as agent for another; such purchase is void. *Harrison vs. McHenry.* 10 Ga..... 164

20. The assignee under a Sheriff's sale, is the assignee of the defendant in *fi. fa.*; as much so as if the latter had assigned to him directly, and may recover on the covenants of warranty in the previous deeds; it is part of the debtor's "right, title and interest in the premises." *Redwine vs. Brown et al.* 10 Ga..... 311

21. Vendees under judicial sales, shall not be put to the same proof in ejectment, as in common cases of persons buying lands from individuals. *Whatley vs. Doe ex dem. Newsom.* 10 Ga..... 74

22. A purchaser at Sheriff's sale has only to show his deed, the execution under which the land was sold, and prove title in the defendant, or possession since the rendition of the judgment, and the *onus probandi* is cast upon the opposite party. *Ibid.*

23. In a Sheriff's deed, the property must be described with reasonable certainty; and he can sell nothing under an execution which the creditor cannot enable him so to describe. *Whatley vs. Doe ex dem. Newsom.* 10 Ga..... 74

24. The purchaser under the vendor or vendee of land, like a purchaser from either by voluntary conveyance, succeeds but to the interest which the debtor had power to encumber or part with, the one being entitled to call for the purchase money, as the representative of the vendor, and the other being entitled to call for a conveyance, as the representative of the vendee. *Wilkerson et al. vs. Burr.* 10 Ga.... 117

25. The judgment creditors of the vendee of land, (who has paid part of the purchase money and has possession of the land, but has received no deed,) are entitled to the proceeds of the sale of his title, in preference to the vendor. *Ibid.*

26. A purchaser at Sheriff's sale, who has his deed first recorded, will gain the same preference over an unrecorded deed, as if he had bought directly from the debtor himself. *Ellis vs. The Lessee of Smith.* 10 Ga..... 253
27. If P. a purchaser at Sheriff's sale, agrees with W. the defendant in *fi. fa.* that the latter may redeem the property, by paying the purchase money back to P. and W. pays a part, and subsequently, within a reasonable time, does pay, or offers to pay the balance, he acquires a title to the property which will subject it to levy and sale as his property. But if, after such an agreement, and after the payment back of a part only of the purchase money, P. and W. together with others, or by themselves, enter into a new contract, by which P. agrees to convey the property to a third person, and W. is to pay back to P. the purchase money, and to have satisfaction entered upon a judgment against him, held by this third person, this new contract is valid, and the property is not subject to the lien of a judgment against W. *Dowdell vs. Neal.* 10 Ga..... 148

SATISFACTION. See *Payment.*

SAVANNAH.

1. The jail in the City of Savannah, must, under the legislative Act of 1822, taken in connection with prior Acts and circumstances, be considered as the County jail; and as such, liable to the control of the Legislature and the possession of the Sheriff. *State vs. Mayor, &c. R. M. Charl.*..... 250
2. By a legislative Act passed in 1760, the town common, streets, lanes, &c. in the Town of Savannah, were declared to be the common property of the lot-holders in said Town, and commissioners were appointed to carry the Act into execution. By an Act of 1787, a President and Wardens were directed to be chosen, with power to make by-laws, assessments, and to lease and sell any public lots, &c. By Act of 1789, the Town was styled "the City of Savannah," and a Mayor and Aldermen were directed to be elected, and were declared to be a body politic, with the power of acquiring and holding property, real and personal, for the benefit of said City: *Held*, that by the Act of 1760, the legal title to the town common, streets, &c. vested in the lot-holders or public, in their collective capacity, and as a corporation, *sub modo*, which became transferred by the Act of 1787 to the President and Wardens, and finally, by Act of 1789, became vested in the "Mayor

and Aldermen," &c. *The Mayor, &c. vs. The President, &c. Steam-boat Co. R. M. Charl* 342

3. *Held*, further, that if the legal title did not pass by the Acts of 1760 and 1787, to the public or lot-holders, as a corporation, *sub modo*; then, as it could not vest in them individually, and there was no one capable of taking and holding at the time of the grant, such grant of the Town common, streets, &c. must be considered as a dedication to public uses, which, by operation of law, became vested in the Mayor and Aldermen, as soon as they were incorporated. *Ibid*.
4. *Held further*, that for the purpose of sustaining the action of ejectment, the term "lots" used in the Act of 1787, might be construed to embrace the streets, town common, &c. so as to enable the corporation of Savannah to make a demise of a public street. *Ibid*.
5. And it seems that the corporation having the legal title and the possession of the street, might, (apart from the Act of 1787,) have made a demise of it for the purpose of sustaining ejectments. *Ibid*.
6. An Ordinance of the City Council of Savannah, passed under the authority of an Act of the Legislature of Georgia, imposed a tax on all goods, &c. not the produce of the State, sold on commission by any person not residing within the City: *Held*, that such a tax was not an impost nor duty on imports, but that it was the legitimate exercise of the power of a State to regulate its internal commerce. *Cumming vs. Mayor, &c. R. M. Charl*..... 26
7. The same ordinance required the City Treasurer, in default of any person to make returns, to assess the value of the goods sold by such defaulter, from the best information he could obtain, and to issue his warrant of distress for the amount of such assessment: *Held*, that such arbitrary assessment was violative of private right, unauthorized by the State Law, and unconstitutional. *Ibid*.
8. An ordinance of the City of Savannah, made under the authority of an Act of the Legislature, inflicting a penalty on any person who should sell domestic liquors within the limits of the City, without having them guaged and inspected by the City Inspector, to whom a small fee was to be paid by the vendor, is an inspection law and constitutional. *Green vs. The Mayor, &c. R. M. Charl*..... 368
9. An Act of the Legislature, passed in 1834, appointed the Mayor and Aldermen of Savannah Commissioners of the jail of Chatham County, with power to appoint a jailer. The custody of the jail prior to that Act was vested in the Inferior Court and Sheriff of the County. The corporation having appointed the jailer, D, the then Sheriff, elected prior to the Act of 1834, refused to deliver possession of the jail

and custody of the prisoners, on the ground that the Act of 1834 was unconstitutional, so far as it impaired his rights acquired before its passage: *Held*, that the Act was constitutional and valid. *State vs. Dews. R. M. Char.*..... 397

10. The Act of 1841, requiring the Mayor and Aldermen of the City of Savannah, and others, to appoint commissioners to determine the proper line of wharf-heads, along said Island, is *mandatory*, and not *permissive*; and the service not being foreign to their official duties, is obligatory on them; and it is no excuse for their refusal, that in their opinion, or that of others, it will injure the navigation of the river Savannah, and the commerce of the City, and the public generally. *Mayor and Aldermen of Savannah vs. The State ex rel. Green et al.* 4 Ga. 26
11. The ordinance of the corporate authorities, requiring free persons of color, on removal to the City, to pay a tax of one hundred dollars, and be imprisoned until paid, is *void* as to the *imprisonment*. *Cooper and another vs. The Mayor, &c.* 4 Ga..... 168
12. The City Council of Savannah, under authority of an Act of the Legislature, passed two several ordinances, prohibiting the cultivation of rice within the corporate limits, and providing for the destruction of growing crops: *Held*, that these ordinances were good and valid, and binding upon the inhabitants as *police* regulations, and that the City Council had power and authority to judge of, and declare the planting of rice within the corporate limits, to be injurious to the health of the City and a public nuisance, and to abate the same. *Green vs. The Mayor, &c.* 6 Ga..... 1
13. Taxation, in reference to the subject-matter, is divided by writers on political economy, as well as by the tax laws of all governments, into three classes: *capitation, property and income*. *The Mayor, &c. vs. Hart-ridge.* 8 Ga..... 23
14. A charter authorizing a municipal corporation to tax real and personal estate, does not necessarily confer the right to tax income. *Ibid.*
15. The history of the legislation of the State, as to a particular subject-matter of taxation, may be referred to, as tending to aid in the construction to be given to the Statute; and where the State has never taxed income, the power to do so in a corporation must appear by express words or unavoidable implication. *Ibid.*
16. In a matter of complaint against the Savannah & Ogeechee Canal Company, that they were guilty of a nuisance by obstructing the drainage of the low lands of the Springfield plantation, the City Council of Savannah determined that they were guilty of the nuisance, and that they be notified to remove it within a specified time, by consturcting

- an additional culvert, and in default thereof, that the culvert be built by the City; and that *the company pay the cost of its construction*: *Held*, that the resolution as to the costs is not a judgment by which the rights of the company are concluded, and that the City Council had power to pass such a resolution. *The Mayor, &c. Savannah vs. The Savannah & Ogeechee Canal Co.* 9 Ga..... 281
17. A Statute of the State declaring of full force, all the ordinances of a City, or other corporation, "in operation" at its date, does not embrace one which has been *judicially* pronounced by the *Superior Court* to be *inoperative* before its passage. *Allen, Ball & Co. vs. The Mayor, &c.* 9 Ga..... 286
18. The phrase "in operation" defined. *Ibid.*

SCIRE FACIAS.

1. Judgment cannot be entered upon a recognizance, until *sci. fa.* has been issued and served on the sureties. *Gilmer vs. Blackwell et al. Dudley*..... 6
2. In *sci. fa.* against bail, where no plea has been filed, judgment may be rendered *upon motion*, without the intervention of a Jury; *aliter*, where defence made. *Reed vs Sullivan, Ex'r.* 1 Kelly, 294. See also, *Garvin vs. Gallagher.* 1 Kelly..... 316
3. The service of *sci. fa.* against bail in Georgia, is very much as in England; the return of two *nihils* will authorize farther proceedings. *Ibid.*
4. A *sci. fa.* against a single defendant, as bail issued by the Clerk of one County and directed to the Sheriff of another County, is bad, and will be quashed upon motion. *Ibid.*..... 315
5. A *sci. fa.* against bail is not such an original suit, within the meaning of the Constitution of Georgia, as to require it to be instituted in the County of the bail's residence. *Ibid.*
6. Judgment upon *sci. fa.* to make parties, should be entered on the *minutes* of the Court. An entry on the docket, of "parties made," is insufficient. *Bryant, Guardian, &c. vs. Owens and Wife.* 1 Kelly..... 367
7. Is the proper remedy on a bond for appearance in a criminal case given to the Sheriff? *Park vs. The State.* 4 Ga..... 329

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8. The record must show the forfeiture of the bond. *Ibid.*

 9. After final judgment against the original party, the plaintiff may by *sci. fa.* charge the estate of the surety on appeal. *Bank of Charleston vs. Moore.* 6 Ga..... 416

 10. *Scire facias* to revive a judgment must issue from, and be returnable to, the Court of the County in which the judgment was obtained, and service must be perfected, when the defendant or defendants reside out of the County, by sending out process to the County where they respectively reside, directed to the Sheriff of that County, whose duty it is to serve them personally and return the process. *Dickinson vs. Allison.* 10 Ga..... 557

 11. *Scire facias* to revive a judgment, held not to be an original action, but a continuance of the suit in which the judgment was obtained. *Ibid.*

See *Abatement. Bail. Judgment, VI.*

SEAL.

1. An instrument having a scrawl annexed to the signature, is a sealed instrument, though it contain no words signifying the intention of the party to make it one. *Smith vs. Baker.* Ga. Dec. part I..... 126
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SEAMEN.

1. Where a seaman is committed under warrant of a Justice of the Peace, by authority of the Act of Congress, the Superior Court has no authority to review the exercise of that power, to inquire whether it is properly executed. *State vs. Plime and Vessel.* T. U. P. Charl... 142

2. For the purpose of testimony, a seaman is a component part of his ship, and until an adjudication is had, he is in the custody of the captors, unless the admiralty take some other method to obtain his testimony. *State vs. Wederstraudt.* T. U. P. Charl..... 214

3. Under the Act of Congress authorizing the commitment of seamen un-

til the vessel shall be ready to proceed on her voyage, the seamen cannot be retained in custody after the vessel has taken its departure.
State vs. Patterson. T. U. P. Charl...... 311

SEDUCTION. See *Abatement*, 6.

SET-OFF.

1. If A contracts a debt with B, as the administrator of C, and is sued for the same, he cannot plead as a set-off, a debt due to him from C, the intestate. *Crawford, Adm'r, &c. vs. Beal et al. Dudley*..... 204
2. But where the debt sued on was originally due to the intestate, instead of his administrator, the debts are mutual—and may be pleaded as a set-off. *Ibid.* See also, *Antony vs. Miller, Ex'r. Ga. Dec. part I.*.... 30
3. In a City Court whose jurisdiction is limited to a particular amount, a set-off which exceeds such amount, cannot be pleaded. *Reed vs. Cormick. Dudley*, 20. See also, *Cash vs. Cash et al. Ga. Dec. part I.*... 97
4. Debts must be mutual, i. e. between the same parties, to be set-off against each other. *Cash vs. Cash et al. Ga. Dec. part I.*..... 97
5. Justices of the Peace before whom a set-off is pleaded, when the debts evidently are not mutual, ought not to refer the set-off to the Jury. *Buchanan and Hunt vs. Gamble. Ga. Dec. part I.*..... 156
6. A Court of Equity will not set-off a claim not subsisting at the commencement of an action at Law, against the judgment when rendered, even if the plaintiff at Law is insolvent. *Bemis vs. Simpson. Ga. Dec. part II.*..... 224
7. The excess of usury over and above principal and legal interest, may be pleaded by way of set-off to an action instituted by the lender against the borrower, in any case where the plea of set-off would be admissible under the law. *Rackley vs. Peurce. 1 Kelly*..... 242
8. A debt which accrued in the lifetime of the testator or intestate, cannot be set-off against a debt which accrues to the executor or administrator, after the death of the testator or intestate. *Mills et al. vs. Lumpkin, Adm'r. 1 Kelly*..... 513
9. With regard to sets-off, Courts of Equity follow the law, unless when some peculiar equities intervene between the parties. *Ibid.*

10. The maker of a promissory note, in an action by the indorsee who received it after due, cannot set-off a demand against the payee, unless such demand is connected with, or grew out of, the original transaction for which the note was given, or attaches to the note itself; he cannot set-off a demand arising out of collateral matters. *Tinsley vs. Beall*. 2 *Kelly*..... 135
11. To authorize a defendant to set-off a demand under the XXIVth section of the Judiciary Act of 1799, such demand must be against the plaintiff in the action. *Ibid*.
12. One judgment may be set-off against another, although all the parties to the different records are not the same. *Colquitt vs. Bonner*. 2 *Kelly* 156
13. In a suit by A against B, principal, and C, surety, on a joint and several promissory note: *Held*, that B might set-off an open account he held against A. *Harrison & Sons vs. Henderson*. 4 *Ga*..... 198
14. Where the demands are *mutual*, a set-off will be allowed in favor of a defendant, in an action brought by an executor or administrator, on a demand due his testator or intestate in his life-time. *Ray, Adm'r, vs. Dennis*. 5 *Ga*..... 357
15. When a defendant pleads a set-off of a larger amount than the intestate's demand, the plaintiff may reply by showing that the estate is insolvent, and that there are outstanding debts of higher dignity than the defendant's set-off, sufficient to exhaust the assets, for the purpose of protecting the administrator from an absolute judgment. *Ibid*.
16. A debt, to come within the law of set-off, must be a money demand of a liquidated nature, and for which *indebitatus assumpsit*, or some other action, *ex contractu*, will lie. A right of action for breach of warranty is not such a debt. *Crenshaw vs. Jackson*. 6 *Ga*..... 509
17. Upon the transfer of a note payable to bearer by delivery, the transferor ceases to be a party to it, and is not generally responsible thereon to the transferee, or any subsequent holder. But if he undertake to guaranty the payment of the same, he will be liable on that special contract, and that is a proper subject-matter of set-off. *Ibid*.
18. The mere existence of cross-demands will not be sufficient to justify a set-off in Equity. A debtor to a bank for borrowed money, cannot set-off against his note or a judgment recovered thereon, the dividend that will be coming to him as a stockholder in the company, when its affairs are wound up. A set-off is, ordinarily, allowed in Equity, only when the party seeking the benefit of it can show some equitable

- ground for being protected against his adversary's demand. *Ruckersville Bank et al. vs. Hemphill et al.* 7 Ga..... 396
19. It is otherwise if there be an express agreement to set-off the debts against each other, *pro tanto*. In such a case a Court of Equity would enforce a specific performance of the stipulation, although at Common Law the party might be remediless. *Ibid.*
20. The question discussed, whether, under our Statute, where the defendant upon a plea of set-off recovers a balance against the plaintiff, the plaintiff has a right, on the appeal, to dismiss his action so as to defeat the judgment. *Attaway, Guardian, vs. Dyer et al.* 8 Ga..... 184
21. Where B. obtained a judgment against W. for \$1200, and subsequently thereto, W. purchased judgments against B. for \$1384, and filed a bill to have the latter judgments set-off against, and in satisfaction of the former: *Held*, that under the Act of 1799, it should affirmatively appear that there were no other judgment liens upon the defendant's property, before the Court of Equity would decree satisfaction of a particular judgment, and that complainant had an ample and adequate remedy at Law. *Wellborn vs. Bonner.* 9 Ga..... 82
22. The judgment and not the execution issued thereon, is the proper subject-matter of set-off. *Bryant vs. Hambrick.* 9 Ga..... 133
23. Against a claim for *mesne* profits, in the nature of damages, the value of the improvements made by the defendant, is a fair set-off, provided he took possession of the premises *bona fide*. *Beverly und another vs. Burke.* 9 Ga..... 440
24. Set-off not allowed by the Common Law. *Meriwether and another vs. Bird, Adm'r.* 9 Ga..... 595
25. The Statute of 2 Geo. II. c. 22, has been introduced generally into the United States, with some modifications. *Ibid.*
26. Set-off is a plea *in bar* of the plaintiff's action. *Ibid.*
27. The commencement of the action and not the time of trial, is ordinarily the period at which mutual debts are to be set-off against each other. *Ibid.*
28. The doctrine of set-off was borrowed from the Civil Law, and should be interpreted by the same principles of construction. *Ibid.*
29. Justice demands that the claim of the debtor not bearing interest, should be set-off against that of the creditor drawing interest, as of the time it became due and owing. *Ibid.*

- . Our Statute disallowing interest on open accounts, does not in any way affect the law of set-off. *Ibid.*
- . Against a claim for *mesne* profits, in the nature of damages, the value of the improvements made by the defendant, is a fair set-off, provided he took possession of the premises *bona fide*. *Beverly and another vs. Burke*. 9 Ga..... 440
- . *Trespassers* are not entitled to the benefit of this principle, except where the profits of the premises have been increased by the repairs or improvements which have been made. In that case, it is proper for the Jury to take into consideration the improvements or repairs, and diminish the profits by that amount, but not below the sum which the premises would have been worth without such improvements or repairs. *Ibid.*
- . Whether the defendants are trespassers, is a question of fact, to be submitted to the Jury. *Ibid.*
- . Usury paid on a former contract, may be pleaded as a set-off to the existing debt, provided it be not barred by the Statute of Limitations. *Zeigler vs. Scott, Adm'r*. 10 Ga 389
- . In an action of assumpsit for money had and received, the borrower can only recover the usurious gain or excess. He is entitled to no more by way of set-off. *Ibid.*

SHERIFFS.

- I. GENERALLY: AND HEREIN OF RULES *VS.*
- II. DUTIES AND LIABILITIES.
- III. RETURNS AND FEES.
- IV. DEPUTY: APPOINTMENT, &c.

AS TO ATTACHMENT FOR CONTEMPT, see *Attachment, VII.*
 AS TO BOND, see *Bond, II.*
 AS TO ESCAPES, see *Escapes.*
 AS TO SALES BY SHERIFF, see *Sales, II.*

I. GENERALLY: AND HEREIN OF RULES *VS.*

A Sheriff can sell nothing but *goods and chattels, lands and tenements*; a right to receive a distributive share is neither. *Colvard vs. Cox, Adm'r. Dudley* 99

2. A Sheriff in Georgia is entirely a ministerial officer, whose province is to execute duties prescribed by law, and which duties may be contracted or enlarged at the will of the Legislature. *State vs. Dews. R. M. Charl.*..... 397
3. A rule against a Sheriff to pay over money, is not sufficiently certain, unless it state the Court in which the judgment and execution claiming the money was had. *Bethune vs. Bonner. 2 Kelly*..... 169
4. In Georgia is not a judicial officer. *Park vs. The State. 4 Ga.*..... 329
5. A bond for appearance in a criminal case, given to the Sheriff, is good. *Ibid.*
6. Failure of consideration is a good plea to a note given by the Sheriff, in discharge of a rule absolute against him, to pay the money due on an execution, when that rule is subsequently rescinded as illegal and unjust. *Barrow vs. Chipman. 4 Ga.*..... 200
7. A Sheriff duly elected, but not having executed a bond according to law, within thirty days after his election, is an officer *de facto*, and his acts are valid when they concern the public or third persons who have an interest in them. *Crawford, Gov. vs. Howard et al. 9 Ga.*..... 314
8. May an officer who is sued for not levying upon property as belonging to the debtor, prove paramount title in another, in his defence? And will such defence be available where the execution is founded upon a judgment of foreclosure of a mortgage on real estate? *Quere. Holley vs. Wallace et al. 10 Ga.*..... 158

See *Attachment, VII.*

II. DUTIES AND LIABILITIES.

1. When an attachment has been granted against a Sheriff for neglecting to levy an execution, he may purge his contempt by selling all of the defendant's property, and bringing the money into Court before the attachment issues, even if other executions claim it all. *Critenden vs. Brady. Ga. Dec. part II.*..... 219
2. If it is admitted to be true, or found so by a Jury, upon issue submitted for that purpose, that the Sheriff suffered a prisoner in custody, under an attachment, to go at large in the jail, with a full knowledge that there was a breach in the wall of one of the rooms, through which he could and did escape, the Sheriff is liable to an attachment, and the party injured will not be driven to his action for an escape. *Craig et al. vs. Maltbie. 1 Kelly*..... 547-9

3. A letter addressed by the plaintiff's attorney to the Sheriff, authorizing him to allow certain payments in calculating the amount due on sundry *f. fas.* does not give that officer power to enter those sums as credits upon said *f. fas.* *Harden et al. vs. Central Bank.* 5 Ga..... 449

4. An entry on *f. fa.* by the Sheriff of *any* County in Georgia, is a sufficient compliance with the Act requiring an entry within seven years, by the proper officer for executing the same. *Duncan vs. Webb & Foster.* 7 Ga..... 187

5. If any one is injured by the false or fraudulent return of the officer, he has his remedy against him. *Ibid.*

6. Where a Sheriff sells land under execution, and goes out of office before executing title to the purchaser, his successor in office may execute a title to such purchaser, without an order of Court. *Fretwell vs. Doe ex dem. Morrow.* 7 Ga..... 264

7. Where a Constable levies a Justice's Court *f. fa.* on land, and delivers the same over to the Sheriff, for the purpose of sale, as provided in the Act of 1811, such Sheriff is lawfully seized of the land, to sell the same and to convey title to the purchaser thereof. *Ibid.*

8. A rule absolute against the Sheriff, ordering him to pay over money, is neither an extinguishment of his official security, nor a bar to a suit against his sureties. It is but one of several remedies which the injured party may use successively, until he obtains satisfaction. In a suit on his bond, it is *conclusive* against the principal, but *presumptive* evidence only against the sureties; and they will be allowed to prove everything *ab origine*, which would have protected the principal from liability. *Crawford, Gov. &c. vs. Word et al.* 7 Ga..... 78

9. In an action against the Sheriff for neglecting or refusing to levy an execution on the property of the defendant, the measure of damages is the amount of the execution; and neither the officer himself nor his securities, when sued on the bond, will be permitted to give in evidence to reduce the recovery, the insolvency of the defendant, and that there were outstanding liens against him, at the time the official default occurred, more than sufficient to cover the proceeds of the property, had it been brought to sale. *Ibid.*

10. The Inferior Courts in this State have jurisdiction, under the Act of 1847, to discharge defendants imprisoned on *mesne* or final process for debt, (when the jail fees are not paid weekly,) on a writ of habeas corpus: and the judgment of such Court, whether *erroneous* or not, ordering the Sheriff to discharge a defendant imprisoned on final process for debt, will be a protection to such officer. *Chamblee vs. Holcombe.* 7 Ga..... 419

11. The Act of 1823, which authorizes the Sheriff to place the purchaser of real estate in possession, does not justify the officer in dispossessing any other person but the defendant in execution, his heirs or tenants. *Bethune vs. Wilkins et al.* 8 Ga..... 118

12. Where a Sheriff sold negroes under execution at a Sheriff's sale, and delivered one of the negroes to the purchaser, with the understanding that the Sheriff was to call at a certain bank the next morning and receive a check for the purchase money; when the Sheriff called, the check was refused, under instructions from the purchaser, because the negro had runaway or been carried off the night before: *Held*, that the Sheriff was liable to be ruled at the instance of the defendant in execution, for the surplus of the sale, after paying the *fi. fas.* *Held*, also, that the delivery of the slave to the purchaser, under the circumstances, was a matter exclusively between the Sheriff and the purchaser, with which the defendant had no concern, although her agent was present when the arrangement was made. *Davis vs. Irwin.* 8 Ga..... 153

13. When a rule is made absolute against a Sheriff for the payment of money, an attachment cannot issue thereon against him, until he is first called upon to show cause why an attachment should not issue. *Ibid.*

14. A sale of lands, under a judgment against an executor, *de bonis testatoris*, conveys a good title to the purchaser, and the title of the heirs is divested. *Doe on dem. Worthy vs. Hames.* 8 Ga..... 234

15. Where property of a defendant in execution is seized and sold by the Sheriff, there is no warranty of title on the part of the defendant in execution or the Sheriff. The maxim of *caveat emptor* applies. *McWhorter, Adm'r, vs. Beavers.* 8 Ga..... 300

16. When a Sheriff has received money on a *fi. fa.* the Statute of Limitations commences to run in his favor from the time it was received. *Thompson vs. The Central Bank.* 9 Ga..... 413

17. A defendant arrested under *ca. sa.* and allowed prison bounds, is still in the custody of the Sheriff, and he must place him in confinement at the end of six months, without any special order. *Jackson & Co. vs. Cox.* 9 Ga..... 172

III. RETURNS AND FEES.

1. The Sheriff is not entitled to fees for dieting slaves levied on, where he did not actually furnish the subsistence agreed on. *Hopkins et al. vs. Bolton, Ex'rof Livingston.* T. U. P. Charl..... 294

2. No private contract, nor extraordinary trouble, can authorize the Sheriff to receive other or higher fees than are prescribed by law. *Forbes vs. Morel. R. M. Charl.*..... 23
3. It seems that the Sheriff is entitled to charge the legal fee for dieting negroes levied on by him under execution, although such negroes were allowed to remain in possession of defendant, and no subsistence was furnished by the Sheriff. *Ibid.*
4. In such case, the Court will not grant an attachment against the Sheriff, to compel him to bring into Court the money retained by him to answer this charge, but will leave the party to the prosecution of his ordinary remedy by action. *Ibid.*
5. A Sheriff's return of service cannot be impugned by a bill filed to set aside the judgment. *Stiles vs. Knapp et al. Ga. Dec. part II.*..... 36
6. Where a former Sheriff is in custody under attachment, and the present Sheriff, in answer to a rule to produce the body, shows for cause why he cannot, that the defendant has escaped from jail without his permission or any negligence on his part, it is competent for the party moving, under the Act of 1840, (authorizing the return of Sheriffs, Constables, Coroners and Justices of the Peace, to be traversed) to controvert the return. *Craig et al. vs. Malibie. 1 Kelly.*..... 545-7
7. The commissions of Sheriffs on money raised by levy and sale, are regulated according to the amount of the executions. On executions not exceeding in amount sixty-four dollars and twenty-eight cents, they are entitled to six and a quarter per cent.; on executions above that sum, but which do not exceed four hundred and twenty-eight dollars and fifty-six cents, three and one-eighth per cent.; and on executions which exceed that sum, one and one-fourth per cent. And on all balances remaining to be paid to the defendant in execution, or otherwise disposed of, the Sheriff is entitled to the same commissions, relatively to amount, as in case of executions. *Aycock vs. Buffington, Guardian. 2 Kelly.*..... 269
8. A Sheriff for the performance of his legal duty, is only entitled to such compensation therefor, as the law prescribes. *Hicks vs. Moore et al. 2 Kelly.*..... 242
9. Where a Sheriff levied on slaves by virtue of an attachment, and while in his possession, worked and hired them out for his own use and benefit; and a verdict of the Jury having been returned on an issue directed by the Court, finding that the labor of the slaves was worth the *per diem* allowance authorized by law for keeping them: *Held*, that the Sheriff was bound to account for the same, on a rule

against him to pay over the money in his hands arising from the sale of the property, at the instance of the creditors. *Ibid.*

10. The ordinary returns of a Sheriff on process in his hands are not traversable. *Higgs vs. Huson.* 8 Ga..... 317
11. Where a Sheriff seized and sold the property of a defendant for an amount larger than the sum due on the execution, and returned that the proceeds of the sale were taken for costs, without specifying what costs: *Held*, that such a return was neither legal nor proper, and that it was his duty to state distinctly in his returns, the particular items of costs for which the money arising from the sale of the defendant's property was appropriated. *Harrison vs. Thompson.* 9 Ga..... 310

IV. DEPUTY, APPOINTMENT, &c.

1. A Sheriff is liable to be attached for the failure of his deputy to pay over money collected on an execution by him. *In the matter of John S. Stephens.* 1 Kelly..... 587
2. The appointment of a Deputy Sheriff may be made by parol, and the admissions of the principal, his recognition of the acts of his deputy, or holding him out to the world in any other way as such, would be sufficient evidence of his appointment. *Mathis vs. Pollard.* 3 Kelly. 2
3. The Sheriff is liable for money collected by his deputy, no matter how the execution under which it is paid, comes into his hands. *Ibid.*
4. Where a judgment is rendered against the Sheriff, for the official misconduct of his deputy, the deputy himself being present in Court and making a return to the rule, he is concluded by the judgment, in an action against him by the principal for reimbursement. *Holly vs. Wallace et al.* 10 Ga..... 158
5. How far is the surety of the deputy who had no judicial notice of the proceeding, bound? *Query.*

SLANDER. See *Libel and Slander.*

SLAVES AND FREE PERSONS OF COLOR.

I. GENERALLY.

II. MANUMISSION AND EMANCIPATION OF.

AS TO TRIAL OF, see *Criminal Law*, *passim*.

AS TO GIFT OF, see *Gift*.

AS TO EVIDENCE OF, see *Evidence*, VII.

I. GENERALLY.

1. Under the Act of 10th of May, 1770, no punishment was prescribed against a freeman of color, for inveigling or attempting to inveigle a slave. *Ex parte George. T. U. P. Charl.*..... 80
2. Where the descendant of a negro had contracted marriage with a free white person in a neighboring State, enjoyed liberty and property for a long time, and transmitted them to her descendants, the Courts in this State presume her free, so far as to give effect to a deed made by her, until some one should assert and maintain a right to her as a slave. *Hunter vs. Shaffer. Dudley*..... 225
3. The benefits of the writ of *habeas corpus*, belong to all free persons of every country and of every complexion, but not to a slave. *State vs. Philpot. Dudley* 46
4. The writ of ravishment of ward, under the Statute 1790, was given to try the right of freedom against the claim of perpetual service, and nothing more; it will extend to no other case of the detention of free persons of color, however illegal. *Ibid.*
5. The doctrine that the principal is not liable to one agent or employee, for damages occasioned by the negligence or misconduct of another agent or employee, is not applicable to slaves. *Scudder vs. Woodbridge. 1 Kelly*..... 188-200
6. The employee of a slave is liable, in damages, to the owner, if such slave be killed or injured by the negligence or unskilfulness of other agents or employees of the defendant, engaged in the same service. *Ibid.*
7. Free persons of color are not citizens in Georgia. *Cooper vs. Mayor, &c. 4 Ga.*..... 68
8. In Equity, a bill for specific delivery of slaves, must allege other cir-

- cumstances besides naked title, to give jurisdiction. *Dudley vs. Mal-
lery*. 4 Ga..... 52
9. Where a free person of color is a party to a suit, in the Courts of this
State, and dies, the suit abates; and administration should be taken
out on the estate of such free person of color. *Scranton et al. vs. De-
mere et al.* 6 Ga..... 92
10. A warranty of a slave to be *healthy*, does not extend to a warranty
of soundness of mind, but of body only. *Nelson vs. Biggers*. 6 Ga... 205
11. If a negro interpreter, incapable by law of being sworn, is the only
channel of communication between the testator and scrivener who
writes the will, and there is no other evidence of the testator's knowl-
edge of its contents, or his assent thereto, than that which is derived
through this medium, the will cannot be executed. *Potts et al. vs.
House*. 6 Ga..... 324
12. But if the will be written in the presence of the testator, and in a
language which he understands, and it is read over to him, and his
dictation and approval of the instrument are interpreted by a negro
in his hearing, and in the hearing of others interested in its contents,
and he signifies no dissent thereto, by signs or otherwise, but, on the
contrary, is understood to express himself satisfied, the will may be
established; especially if it appears to have been made in conformity
to the previously declared intentions of the testator, as to the disposi-
tion of his property. *Ibid.*
13. The black color of the African race is *prima facie* evidence of slave-
ry. *Macon & Western R. R. Co. vs. Holt*. 8 Ga..... 157
14. A permit or ticket to a slave, must specify the length of time that
he is to be absent, and the places which he is allowed to visit. *Ibid.*
15. The Macon & Western Railroad Company took on board their cars
the slave of H. having a general pass, and without the knowledge and
consent of H. to transport him to a given point, for the usual fare for
negroes: *Held*, that this was a conversion of the slave, and that the
company are liable for all the injuries which he received, whether
they occurred by the negligence of the company or otherwise. *The
Macon & W. R. R. Co. vs. Holt*. 8 Ga..... 157
16. To entitle the vendee to recover of the vendor, for a breach of war-
ranty of the soundness of negro children, whose mother was proven to
have died of consumption, it is necessary to show, either that the dis-
ease was hereditary in the family, or that the children were born sub-
sequent to the actual existence of the complaint in the mother. *Dean
vs. Taylor*. 8 Ga..... 169

17. In cases of felony, the civil remedy is suspended until the offender is prosecuted to conviction or acquittal. *Neal vs. Farmer.* 9 Ga..... 555
18. African slavery *held* never to have existed in the island of Great Britain, by the Common Law, by Statute, or by the Laws of Nations. *Ibid.*
19. The Law of Villeinage obsolete in England. *Quere. Ibid.*
20. If not obsolete, but of force in 1732, when the Colony of Georgia was settled: *Held*, that it had no application to African slavery in England or in Georgia. *Ibid.*
21. The Common Law of England *held* to be inapplicable to the institution of slavery, except to protect the rights of masters. *Ibid.*
22. The slave trade *held* to be recognized as a lawful commerce under the Law of Nations, and that Law obligatory upon the States of the world, unless repudiated by treaty or positive law. *Ibid.*
23. *Held*, that by the comity of nations, when a slave escapes into, or is found within the jurisdiction of a State where slavery is not recognized, it is the duty of that State, upon the demand of his rightful owner, to deliver him, to be taken back to the State where, by law, he is a slave. *Ibid.*
24. The origin and character of property in slaves, in this State, defined. *Ibid.*
25. It is not felony in Georgia, by the Common Law, to kill a slave, and the only legal restraint upon the power of the master, over the person of the slave, in Georgia, is such as is imposed by Statute. *Ibid.*
26. In an action of trespass for killing a slave, the defendant pleaded the general issue, and at the trial gave in evidence, by way of justification, that he was acting as a patrol man under the 44th section of the Act of 1770: *Held*, that so much of that Act as is *repugnant* to the Judiciary Act of 1799, which requires the defendant plainly, fully and distinctly to set forth his defence in writing, is repealed by the latter Act. *Brooks vs. Ashburn.* 9 Ga..... 297
27. An estate in remainder in slaves, cannot be created by parol or verbal gift. *Yarborough et al. vs. West.* 10 Ga..... 471

II. MANUMISSION AND EMANCIPATION.

1. If a person making his will, direct that "if any of his slaves should desire to go to the African Colony, they should be permitted to go, and their expenses to the port of embarkation should be paid," such will is not void, under the Act of 1818; nor is it inconsistent with the policy of our laws, but ought to be executed. *Jordan vs. Heirs of Bradley. Dudley* 170
2. A manumission subsequent to the Act of 1801, not sanctioned by legislative authority, is absolutely void, and produces no change in the condition of the slave. *Spencer vs. Negroes Amy et al. R. M. Charl.* 178
3. The Act of 1818, passed in relation to the attempt to manumit slaves illegally, being a penal Statute, cannot be so construed as to accumulate the penalties of the Statute of 1801, to an act committed before the passage of the former Statute. *Ibid.*
4. Construction of the laws of Georgia, concerning manumission. *Marlow et al. vs. Roser. R. M. Charl.* 542
5. A will which directs the executor to apply to the Legislature for the manumission of certain slaves, and if that cannot be accomplished in that manner, that they should be sent out of the State to where it can be done, is not illegal, and does not contravene the policy of our Statutes. *Ibid.*
6. A deed with a proviso, that the grantee shall furnish each of the slaves conveyed with two dollars per month during their natural lives, is not void under the Acts of 1801, and 1818, prohibiting the manumission of slaves. *Spaulding vs. Grigg. 4 Ga.* 75
7. It is not illegal in Georgia to bequeath slaves to the Colonization Society, to be liberated in Liberia, nor to bequeath bank stock, the proceeds of which were to be paid them on arriving in Liberia. *Vance, &c. vs. Executors of Keith. 4 Ga.* 445
8. The following clause in a will held to be void, as in conflict with the Act of 1818, against manumission of slaves: "It is my will that my old servant, *Writ*, and her five children, and her husband, may be made to live comfortable, under the superintendence of my friends, A and B, into whose care and under whose protection, I do hereby give and place the negroes herein named, in view of their being treated with humanity and justice, subject to the laws made and provided in such cases." *Robinson and Wood vs. King. 6 Ga.* 589

9. Parol evidence held admissible to show that a will is illegal and void, as being in conflict with the laws of the State against manumission. *Ibid.*
10. Where a testator by his will directed one of his slaves to be removed to a State where the laws would allow of her manumission and there be manumitted; and also bequeathed \$2000 to said slave, to be invested by a trustee appointed for that purpose, for the benefit of such slave when manumitted, as directed by said will: *Held*, that the direction and bequest contained in the will, did not violate the policy of the laws of this State which prohibit domestic emancipation of slaves. *Cooper, Executor, vs. Blakely, Guardian.* 10 Ga..... 263
11. The case of *Vance vs. Crawford*, (4 Ga. 446,) re-examined and affirmed. *Ibid.*

STATUTES.

I. GENERALLY.

II. CONSTRUCTION OF.

I. GENERALLY.

1. The constitutionality of the Statute of 15th December, 1810, for the more effectually securing the probate of wills, &c. affirmed in the case of *Smith et al. vs. Oliver, Adm'r.* *Dudley*..... 190
2. There is nothing in the 5th section of the Statute of 1799, which by fair construction, will deprive any one of a legal defence acquired without fraud, and subsisting at the time of the decease of his creditor. *Crawford, Adm'r, vs. Grubbs.* *Dudley*..... 206
3. The Statute of 1829, extending the laws of the State of Georgia over the Cherôkee country, commented upon, and its constitutionality affirmed, in the case of *The State vs. Tassels.* *Dudley*..... 230
4. Penal Statutes cannot have a retrospective operation. *Spencer vs. Negroes Amy et al. R. M. Charl*..... 178
5. In general, a Statute which introduces a new rule of law, and directs a particular method of proceeding under it, will, although it has no negative words, debar any other mode. *Guerard vs. Polhill. R. M. Charl* 287

6. If a Statute destroys the character in which persons have acted in a civil or public trust, without pointing out a new mode in which the trust is to be performed, the latter is also at an end. *State vs. Mayor, &c. of Savannah. R. M. Charl.*..... 250
7. Quere? If a Statute which acts retrospectively, and divests a vested right, but does not impair the obligation of a contract, be absolutely void. *Forsyth vs. Marbury. R. M. Charl.*..... 324
8. A legislative Act appropriating property to the public, is an irrevocable grant of such property. *Mayor et al. vs. President of Steamboat Company. R. M. Charl.*..... 342
9. If no time be fixed by a Statute for it to go into operation, it takes effect from its date. *Smets vs. T. and J. Weathersly. R. M. Charl.*.. 537
10. When the provisions of a later Statute are opposed to those of an earlier, the last mentioned must be considered as repealed. *Harri-son et al. vs. Walker. 1 Kelly*..... 35
11. A Statute repealing a former Statute, being itself repealed, the first Statute is revived. *Ibid.*..... 34
12. The Statute of 24 George II. ch. 44, sec. 1, is of force in the State of Georgia. *Warthen vs. May. R. M. Charl.*..... 614-5
13. Act of 1801, authorizing Justices of the Inferior Court to preside in Superior Court in certain cases, declared constitutional. *Taylor vs. Smith. 4 Ga.*..... 133
14. The Act of 9 Geo. II. ch. 36, in reference to bequests to charitable uses, is not of force in Georgia. *Beall and others vs. Executors of Fox. 4 Ga.*..... 404
15. The principles of the Statute of 43 Elizabeth, ch. 4, relative to char-itable uses, have been adopted in Georgia. *Ibid.*
16. A party is not estopped to deny facts recited in an Act of the Legis-lature, so far as the facts recited are concerned; it is no law, and the Court is not bound to take judicial cognizance of it. The investiga-tion of the facts belongs to the judicial department. *Dougherty vs. Bethune, Assignee. 7 Ga.*..... 90
17. A agrees with B, that he shall have the deputation of the Clerkship of the Inferior Court, and receive for his compensation, the fees and costs of the office already accrued, and which are to accrue, and B agrees to pay A therefor, out of said fees due and to accrue, the sum of five hundred dollars, and executes his notes for that sum: *Held, that these notes are void as against the Statute forbidding the sale*

- of public offices, and as opposed to the policy of the law. *Grant et al. vs. McLester.* 8 Ga..... 553
18. Legislative acts as well as decrees of Courts of late years, evince a sounder and purer morality with regard to the liability of moneyed corporations. *Hightower vs. Thornton.* 8 Ga..... 486
19. A private Act of the Legislature, as to its facts and recitals, imports verity equally with the records of the Courts ;still it may be attacked for fraud in its procurement. *Beall, Administratrix, vs. Beall.* 8 Ga. 260
20. Where no time is fixed for the operation of a Statute, it takes effect from its passage, and ignorance of an Act forms no legal excuse for its violation. *Heard vs. Heard.* 8 Ga..... 380
21. Retrospective laws are forbidden by the first principles of justice. *Mayor, &c. vs. Hartridge.* 8 Ga..... 28
22. Courts have nothing to do with the wisdom, policy or expediency of a law. These are matters purely of legislative deliberation and cognizance. *Winter vs. Jones.* 10 Ga..... 190
23. It is the duty of Courts to put such a construction upon Statutes, if possible, as to uphold them and carry them into effect. *Ibid.*
24. Where a private Act of the Legislature was passed, legitimating certain persons therein named, and authorizing them to inherit as lawful heirs of their reputed father, which Act was alleged to have been passed without his assent, it was competent for the party alleging the fraud, to prove that the Senator, who was in the Legislature from the same County in which the reputed father lived, was present in the Senate, heard the bill read three times, and never heard any evidence of the assent of the reputed father, to its passage at that time. *Beall, Adm'x, vs. Beall and another.* 10 Ga..... 342
25. *Held*, also, that it was competent to prove by a witness, who read from a newspaper, in the hearing of the reputed father, the title of the Act, that he angrily replied, "that he wished some people would attend to their own business." *Ibid.*

II. CONSTRUCTION OF.

1. A Statute is never construed to operate retrospectively, if such a construction tends to defeat a freehold interest. *Ex parte Clerk of Camden County. T. U. P. Charl.*..... 194
2. Where a Statute prescribing a bond, declares all bonds not taken in pursuance to it void, the Statute must be strictly pursued, as bonds

- which do not conform to it are void by express enactment; but where the Statute contains no such provision, the conditions of bonds taken under it, which are contrary to the Statute, are alone void, as also are onerous conditions beyond the Statute. *Justices of the Inferior Court vs. Wynn. Dudley*..... 23
3. Statutes giving summary remedy out of the ordinary course of proceeding, must be construed strictly, and confined to cases clearly contemplated by them. *Hale vs. Burton. Dudley*..... 105
4. Statutes against fraud, when they operate upon the offence are to be liberally construed, so as to avoid the fraudulent transaction. *Cumming vs. Frier. Dudley*..... 183
5. Where one section of a Statute, without negative words, introduced a new mode of foreclosing a mortgage of personal property, and pointed out a method by which the mortgagor might dispute the sums due on the execution founded on such foreclosure, and a subsequent section of the same Statute, also without negative words, allowed a defendant to make an affidavit of illegality, in all cases where execution had issued illegally: *Held*, that the remedy in the latter section was not cumulative to the former, and that it referred to executions other than those mentioned in the first section. *Guerard, &c. vs. Polhill. R. M. Charl* 237
6. A Statute should be construed, (if consistent with its general scope,) so as to give it a prospective operation, where a contrary construction would divest a vested right. *Forsyth vs. Marbury. R. M. Charl*.... 324
7. Where there are different Statutes in *pari materia*, though made at different times, and even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other. *Harrison et al. vs. Walker. 1 Kelly*..... 35
8. The Act of June, 1806, providing that when any action shall be instituted within time, and the plaintiff be non-suited, or shall discontinue the same, after the time of limitation is expired, he shall be permitted to renew his action within six months thereafter, once only and not after, was repealed by the Act of December of the same year. *Ibid*.
9. Statutes requiring certain liens to be registered, are in derogation of the Common Law, and cannot be extended by implication to other liens than those specified. Per WARNER, J. in *Tuttle vs. Walton. 1 Kelly* 5
10. In the construction of a Statute, when the words of the enacting clause are clear and positive, recourse must not be had to the title of the

preamble; they serve to assist in removing ambiguities, where the intent is not plain and manifest. *Eastman et al. vs. McAlpin*. 1 *Kelly* 171-2

11. The Act of 1843, amendatory of the Act of 23d December, 1840 to define the liabilities of the several railroad companies in Georgia, for the loss of stock killed or wounded by the running of cars or locomotives on their roads, and to regulate the mode of proceeding in such cases, is prospective in its operation, and cannot be applied to cases arising anterior to its passage. *Girtman vs. Central R. R. & Banking Co.* 1 *Kelly*..... 176
12. Before the enactment of said Statute, the Justice's Courts had no jurisdiction sounding in damages, for any trespass on the person or property. *Ibid*.
13. The omission of the word "grant," in one section of a Statute, may be explained by other parts of the same Statute, so as to supply the omitted word, and give the Act its intended effect. *Brinsfield vs. Carter*. 2 *Kelly* 150
14. Construction of the Central Bank charter and amendments. The Acts of 1829 and 1838, amendatory of the original charter of the Central Bank, clothe it with additional authority, and the Courts are bound to observe their provisions, without their having been pleaded. *Bond vs. The Central Bank*. 2 *Kelly*..... 107-115
15. Statutes enacted in favor of corporations or particular persons, and in derogation of common right, are to be construed strictly. *Young vs. McKenzie et al.* 3 *Kelly*..... 38-40
16. In construing a Statute, the intention of the Legislature is a fit and proper subject of inquiry. The intention, however, is to be collected from the Act itself, and other Acts upon the same matter. *Ezekiel vs. Dixon*. 3 *Kelly* 152
17. When the language of a Statute is clear, direct and positive, leading to no absurd results, and affording a suitable, if not a sufficient remedy for an existing evil, Courts should be governed by the obvious meaning and import of its terms. *Ibid*.
18. Where the General Assembly, by an Act declare, "that the name of S. J. Wells be changed to S. J. Rakestraw, and that she be declared legitimate and capable of inheriting, and like privileges in law as if she had been born in lawful wedlock:" Held, that inasmuch as the illegitimate child was not, by the Act, made legitimate to any particular person, the only effect of it was to change the name. *Edmondson and Wife vs. Dyson*. 7 *Ga*..... 512

19. In the construction of Statutes made in derogation of common right, and in favor of corporations or particular persons, care should be taken not to extend them beyond their express words or their clear import. *The Mayor, &c. vs. Macon & Western R. R. Co.* 7 Ga..... 221
20. Where a railroad company have, by their charter, the exclusive right to carry and transport persons, produce, merchandize and all other things over their road, from Atlanta to Macon: *Held*, that their charter did not confer the right to engage in the business of transporting produce through the City of Macon, across the Ocmulgee bridge, from their depot to another railroad depot, for the accommodation of their customers. *Ibid.*
21. The Act of 1828, which provided that wagons and carriages, loaded with cotton and corn, should pass the Ocmulgee bridge free of toll, is repealed, *pro tanto*, by the Act of 1847, which vested in the corporate authorities of the City of Macon, the right to regulate the tolls of said bridge, this latter Act repealing all laws and parts of laws, militating against its provisions. *Ibid.*
22. In the construction of Statutes made in favor of corporations or particular persons, and in derogation of common rights, care should be taken not to extend them beyond their direct terms or clear import. *Mayor, &c. vs. Hartridge.* 8 Ga..... 23
23. Courts ought so to construe Statutes of distribution, as would most likely effectuate the intention of the parties, had they died testate. *Beall, Adm'r, vs. Beall et al.* 8 Ga..... 210
24. Statutes levying taxes, should be construed most strongly against the government and in favor of the citizen. *Mayor, &c. vs. Hartridge.* 8 Ga..... 23
25. The Legislature, in a charter, declare "that it shall not be lawful for any person or persons, at any time or times, to build any bridge, or keep any ferry on the river Great Ogeechee, within five miles either above or below (another bridge on the same stream:)" *Held*, that the distance of five miles is to be measured by the course of the river. *McLeod et al. vs. Burroughs.* 9 Ga..... 213
26. Grants of exclusive privileges to corporations or individuals, are to be strictly construed; and if the terms of the contract are ambiguous, the ambiguity must operate in favor of the public. *Ibid.*
27. A Statute of the State, declaring of full force all the ordinances of a City, or other corporation, "in operation" at its date, does not embrace one which has been *judicially* pronounced by the *Superior Court*

- to be *imoperative* before its passage. *Allen, Ball & Co. vs. The Mayor, &c.* 9 Ga..... 286
28. The phrase "in operation," defined. *Ibid.*
29. Grants from the Legislature to a company, in derogation of common right, are to be strictly construed. *The Justices, &c. vs. The Griffin, &c. Plank Road Company.* 9 Ga..... 475
- See *Constitutional Law; Corporations; Grants; Lien, I. 1; Railroad and Plank Road Companies; Time, 1.*
- STATUTE OF FRAUDS. See *Contract, II.; Fraud, II.*
- STATUTE OF LIMITATIONS. See *Limitation of Actions.*
- STEAMBOATS. See *Lien, I.*
- SUBROGATION. See *Surety, I. 1, 7.*

SUPREME COURT.

1. The Supreme Court will correct the abuse of discretionary power by the Superior Courts. *Johnson et al. vs. Holt et al.* 3 Kelly..... 118
2. Courts of Equity being clothed with greater amplitude of discretion than Courts of Common Law, a Court of Errors will interfere more sparingly with the exercise of discretionary powers of the former than the latter, notwithstanding the duties of both are discharged by the same incumbent, in Georgia. *Ibid.*..... 120
3. The Supreme Court will not review judgments and decrees, rendered by the Superior Courts in the State for alleged error, committed prior to its organization. *Saunders vs. Smith, Adm'r.* 3 Kelly..... 125
4. The Supreme Court is strictly an appellate tribunal, and corrects only decisions upon questions actually presented for the determination of the Superior Courts. *Doe ex dem. Johnson vs. Lancaster.* 5 Ga. 39

SURETIES AND INDORSERS.

- I. RIGHTS AND LIABILITIES, GENERALLY.
 II. CONTROL OF FI. FAS. VS. PRINCIPAL.
 III. DISCHARGE OF.

AS TO NOTICE TO SUE, see *Promissory Notes, IV.*
 AS TO SURETIES OF ADMINISTRATORS, &c. see *Administrators, &c.*
 AS TO SURETIES OF GUARDIANS, see *Guardians.*
 AS TO SURETIES ON APPEAL, see *Appeal.*

I. RIGHTS AND LIABILITIES, GENERALLY.

1. A surety who pays the debt, is entitled to be substituted in the place of the creditor, as to all the security or means possessed by him against the principal debtor, and all the co-sureties. *Norris vs. Ham et al. R. M. Charl.*..... 267
2. In an action of assumpsit, for the recovery of money paid by a security, he will be entitled to recover interest, if he was liable to it on the demand which he paid. *Knight vs. Mantz. Ga. Dec. part I.*.... 22
3. Payment by surety, and his subsequent re-imbursement by his principal, do not, in law, constitute such surety the agent of his principal, by ratification. NISBET, J. in *Whitehead vs. Peck.* 1 *Kelly*, 151, 152. WARNER, J. contra, dissenting opinion:..... 155
4. Accommodation indorsers are not liable to contribution as sureties, in Georgia, either at Common Law or under the Act of 1826. *Stiles vs. Eastman.* 1 *Kelly*..... 210
5. If a security have knowledge of usury in the contract, and voluntarily pay it, he cannot afterwards recover it of his principal. *Whitehead vs. Peck.* Per NISBET, J. 1 *Kelly*..... 150
6. The relation of principal and surety continues, after judgment in favor of the creditor, against both principal and surety. *Curan vs. Colbert.* 3 *Kelly*..... 250
7. A surety on a sealed note, who has paid the debt of his principal, is entitled, in marshalling the assets of his principal, to be subrogated to all the rights of the creditor, and to rank as a *bond* creditor. *Lumpkin vs. Mills.* 4 *Ga.* 343
- 8 A covenant by a surety, to pay the debts on which he is surety, is a

- valuable consideration for a grant or conveyance of negroes and other property, by an insolvent debtor. *McWhorter vs. Wright, Nichols & Co.* 4 Ga..... 555
9. Parol evidence is admissible, to show that one of the joint makers of a note is surety only, such fact not appearing on the face of the note. *Bank of St. Marys vs. Mumford & Tyson.* 6 Ga..... 44
10. If A holds a demand against B & C, as partners, and C is dead, and there are effects of the firm in the hands of B, the surviving partner, sufficient to pay the debt, and D holds property conveyed to him by C, to indemnify him as surety for C, upon the equities subsisting between B and C, Chancery will compel A to proceed against the property in the hands of B, the surviving partner, so as to leave the property conveyed to D, to be applied to his remuneration as surety for C. *Newsom et al. vs. McLendon et al.* 6 Ga..... 392
11. Plea that the defendant signed the note sued on as surety, and that it was agreed upon between him and his principal, that another should sign it as co-surety, before it was delivered, which was not done: *Held*, that this is not a plea of *non est factum*, and need not be verified. *Cleg-horn vs. Robinson.* 8 Ga..... 559
12. The sureties of a Sheriff, after recoveries have been had against them to the amount of their bond, may defend themselves at Law, against all pending or future suits on that ground. *Bothwell et al. vs. Sheffield et al.* 8 Ga..... 569
13. If a surety to a usurious contract pays usurious interest, knowing it to be such, he cannot recover it back out of his principal. *Jones vs. Joyner et al.* 8 Ga..... 562
14. It is no plea for a surety, that a bond was obtained by duress. *Spi-cer vs. The State.* 9 Ga..... 49

II. CONTROL OF *FI. FAS.* vs. PRINCIPAL.

1. Separate judgments are rendered against the indorsers of the same note; the two last, by agreement with the plaintiffs, take an assignment of the judgment against the first indorser, and pay the plaintiffs the amount due upon the judgments against themselves, which are entered satisfied: *Held*, that the judgment so assigned, is not extinguished by the satisfaction of the judgments against the two last indorsers, and that they might proceed, under such assignment, with the *fi. fa.* against the first indorser, and by levy and sale, reimburse themselves the amount paid out by them, it appearing that they were

- not interested in the consideration for which the indorsed note was given. *Stiles vs. Eastman et al.* 1 *Kelly* 210-11
2. The control of an execution against the maker and prior indorsers, as provided for by the Act of 1839, should be obtained under an order of the Court whence the execution issued, upon the showing required by that Act, in which it is not necessary to show that the payment by the subsequent indorser was forced by levy; it may be voluntary, and yet, in the eye of the law, it is a payment under the compulsion of legal process. *Ibid*..... 211
3. Neither the Acts of 1826, '31, '39, '40, or '41, passed for the relief of securities and indorsers, give the control of executions to indorsers who have paid the same, against prior indorsers, except such executions as have issued on judgments founded on bankable instruments. *Evans vs. Rogers.* 1 *Kelly*..... 467-78
4. A surety to a note, bond or other contract, having failed to make special defence upon the trial, afterwards takes control of the execution against the principal, under the Act of 1831: *Held*, the lien of the judgment in his hands takes effect from the date of that judgment. *Bailey vs. Mizell.* 4 *Ga.*..... 123
5. The several Statutes of Georgia, giving sureties who have paid off *fi. fas.* the control against their principals, extend to the executors or administrators of deceased sureties. *Harris vs. Wynn.* 4 *Ga.*..... 521
6. Nor will the principal be allowed to show that the executor is an executor *de son tort.* *Ibid.*
7. A surety, who has paid a judgment against himself and his principal, which appears to be dormant, is entitled to an order, giving him the control of the same, to test his right to use the same for his remuneration. *Davenport vs. Hardeman.* 5 *Ga.*..... 580
8. Parol evidence is admissible to show that one of the joint makers of a note is surety only, such fact not appearing on the face of the note. *Bank of St. Marys vs. Mumford & Tyson.* 6 *Ga.*..... 44
9. A surety on a claim bond, against whom judgment for damages and costs have been given, together with the claimant, and who has paid off the *fi. fas.* is entitled, under our Statute, to control the same for the purpose of reimbursing himself out of his principal. *Keith vs. Wheelchel.* 2 *Ga.*..... 179

See *Enl. : Bonds.*

III. DISCHARGE OF.

1. A surety is entitled to be relieved in Equity against a creditor who has extended indulgence to his principal after judgment, for a valuable consideration. *McCrarey vs. Coley. Ga. Dec. part I.*..... 104
2. A surety is discharged by the plaintiff's delaying for a consideration, to levy his *fi. fa.* against the principal, who becomes in consequence of the delay, less able to pay. *Morris vs. Foote et al. Ga. Dec. part II.* 119
3. The dismissal of a levy, and the release of the property of principal levied upon, by a creditor having judgment against principal and surety, without the privity of the surety, discharges him. *Curan vs. Colbert. 3 Kelly.*..... 298
4. Any act of the creditor, after judgment against the principal and surety, which injures the surety or increases his risk, or exposes him to liability, will discharge him. *Brown vs. Ex'r of Riggins. 3 Kelly.*.. 412
5. Where the creditor has judgment against both principal and surety, and dismisses a levy made on the property of the principal sufficient to pay the debt, the surety is discharged. *Ibid.*
6. The surety may compel the holder to sue a dormant partner by notice, under the Act of 1831. And if not sued, he is discharged. *Howard vs. Brown, Adm'r. 3 Kelly.*..... 527
7. When one of two sureties is discharged by the act or negligence of the creditor, the other is discharged also. *Jones vs. Whitehead. 4 Ga.* 397
8. Applied to a case where one surety is discharged by giving notice under the Act of 1831. *Ibid.*
9. Notice to the *Cashier* of the bank, by the surety, to sue the principal, is a sufficient notice to the bank, especially where it appears that the bank acted upon such notice. *Bank of St. Marys vs. Mumford and Tyson. 6 Ga.*..... 44
10. A bank, when *holder* of a promissory note, is within the provisions of the Act of 1831, authorizing sureties to give notice to sue. *Ibid.*
11. Parol evidence is admissible to show that one of the joint makers of a note is surety only, such fact not appearing on the face of the note. *Ibid. Judge NISBET dissenting.*
12. The undertaking of a surety, being *stricti juris*, he cannot, in Law or

Equity, be bound further than the very terms of his contract: and if the principal and obligee change the terms of it without his consent, the surety is discharged. *Bethune, Adm'r, vs. Dozier.* 10 Ga..... 235

13. If the obligee bind himself to furnish 800 acres of pine land, to furnish stocks for a saw-mill, and the principal accept of 680 acres in fulfilment of the contract, without the consent of the surety, it is such an alteration of the original bargain as will discharge the surety. *Ibid*
14. Where it is doubtful whether the surety intended to *request* the creditor to sue the principal as a matter of *favor*, or to require it as a matter of *right*, under the Statute, it is proper to submit it to the Jury to find from the facts, how the parties understood the matter. *Ibid.*

TAVERN LICENSE. See *License*.

TAXES AND TAX COLLECTORS.

1. An execution for taxes, takes precedence of *fi. fas.* of older date, in favor of individuals. *State vs. Pemberton et al. Dudley*..... 15
2. No special power of taxing banks in their corporate capacity, has been given to the Mayor and Aldermen of Savannah, by the Act of 1825, and no such power can be implied from the general taxing powers conferred by that Act. *Bank of Georgia vs. The Mayor and Aldermen of Savannah. Dudley*..... 130
3. The City may tax bank stock in the hands of the holders living in the City, for it is personal property and liable to tax under the Act above referred to. *Ibid.*
4. The general power to tax, conferred on Towns and Cities, ought not to be so construed as to subject the property of a corporation to be twice taxed, unless by express words of a Statute or necessary implication. *Ibid.*
5. An ordinance of the City Council of Savannah, passed under the authority of an Act of the Legislature of Georgia, imposed a tax on all goods, &c. not the produce of the State, sold on commission by any person residing within the City: *Held*, that such tax was not an impost or duty on imports, but that it was a legitimate exercise of the power of a State to regulate its internal commerce. *Cumming vs. The Mayor, Aldermen, &c. R. M. Charl.*,..... 26

6. The use of a faro table, for the purpose of gambling, is not rendered lawful by tax imposed on the instrument. *State vs. Doon & Dimond. R. M. Charl.*..... 1
7. When removed upon *quo warranto*, after having collected a portion of the taxes, which was ordered, under the judgment upon the *quo warranto*, to be paid to the Clerk of the Superior Court, an execution issued against him and his securities, as tax collector, by the Comptroller General, is illegal. *Hartley vs. The State. 3 Kelly*..... 233
8. The Act of 1796, authorizing the Interior Court to issue execution against depositaries of public moneys, without trial by Jury, is constitutional, so far as refers to money belonging to the public. *Tift et al. vs. Griffin. 5 Ga.*..... 185
9. But is unconstitutional, as to all others, than Collectors, Receivers, or other legally appointed public agents. *Ibid.*
10. Taxation, in reference to the subject-matter, is divided by writers on political economy, as well as by the Tax Laws of all governments, into three classes: *capitation, property and income.* *The Mayor, &c. vs. Hartridge. 8 Ga.*..... 23
11. A charter authorizing a municipal corporation to tax real and personal estate, does not necessarily confer the right to tax income. *Ibid.*
12. The history of the legislation of the State, as to a particular subject-matter of taxation, may be referred to, as tending to aid in the construction to be given to the Statute; and where the State has never taxed income, the power to do so in a corporation must appear by express words or unavoidable implication. *Ibid.*
13. Statutes levying taxes, should be construed most strongly against the government, and in favor of the citizen. *Ibid.*
14. Statutes which impose restrictions upon trade or common occupations, must be construed strictly. *Ibid.*
15. Revenue Statutes are in no just sense remedial laws, and are not, therefore, to be liberally construed. *Ibid.*
16. In laws imposing taxes, if there be a real doubt whether the intention of the Act was to levy the tax, that doubt should absolve the taxpayer. *Ibid.*
17. Taxes due the State are a general lien upon all the property of the

debtor, attaching on the first of January of each year. *Doe ex dem. Gledney vs. Deavors.* 8 Ga..... 479

18. Where property liable to tax is sold under execution, between the first of January and the giving in of the same, and is afterwards sold under execution, to pay the tax due by the defendant in *fi. fa*: Held, that the purchaser at the Tax Collector's sale gets a good title. *Ibid.*
19. Before the Inferior Court can issue execution against a County Treasurer, for a balance in his hands, ten days' notice is required by Statute to be given him; and the order of the Court under which the *fi. fa.* is issued, must show that such notice has been given. *Foster vs. The Justices, &c.* 9 Ga..... 185

See *Augusta*; *Mistake*, 1; *Savannah*, 7.

TENANTS IN COMMON.

1. Upon the death of one member of a firm, the representatives of the deceased partner become tenants in common with the survivor. *Shad vs. Fuller. R. M. Charl.*..... 501
2. The undivided interest of a tenant in common, may be levied on and sold under execution. *Leonard vs. Scarborough and Wife et al.* 2 *Kelly.*..... 76
3. One co-tenant cannot maintain trespass or trover against the others, so long as the tenancy exists. *Ibid.* See, also, *Hall vs. Page.* 4 Ga. 428
4. A special agent, by mingling his own goods with those of his principal, cannot create a tenancy in common. *Hall vs. Page.* 4 Ga..... 428
5. One of several tenants in common, may sue separately in trover, and the defendant may plead the non-joinder in abatement; but if he fail so to plead, he cannot take advantage of it on the trial, nor by motion in arrest of judgment; but will be confined to giving in evidence the interest of the other co-tenants in mitigation of damages; and the plaintiff may proceed to recover his proportion or aliquot interest in the common property. *Starnes & Paine vs. Quin.* 6 Ga..... 84
6. In such a case, the other co-tenants may afterwards sue severally, for their interest, and the defendant cannot plead the non-joinder of their co-tenants in abatement. *Ibid.*

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7. One tenant in common cannot bring trover against his co-tenant, unless in case of the destruction or sale of the property. *Ibid.*
 8. In case of sale, trover will lie at the instance of the other tenants, against the purchaser; such sale is void as to them, and does not make him a co-tenant with them. *Ibid.*
 9. If one or more tenants in common, in an action of trover, be barred by the Statute of Limitations, and one or more be within an exception in the Statute, their exemption will not relieve against the operation of the Statute as to the one barred; and those within the exception will recover their several interests, notwithstanding the bar of the other. *Jordan vs. Thornton et al.* 7 Ga..... 517

See *Devise and Legacy*, 28.

TENDER.

1. A demand for goods sold at the time and place specified, is *prima facie* evidence of the readiness of the purchaser to pay for them. *Biggers vs. Pace.* 5 Ga..... 171
2. Where goods are to be delivered and money paid, the *actual* tender of the money will be dispensed with by the repeated declarations of the seller, that he will not receive it. *Ibid.*
3. A complainant who relies, for relief, upon a tender, must allege all the facts substantially, which are necessary in pleading a tender at Law. *McGehee and another. Ex'rs, vs. Jones.* 10 Ga..... 127

See *Contract*, IV. 6.

TIME.

1. Where the term "months" is used in a Statute, without defining what kind of months, the Courts adjudge that lunar months are intended. *Redmond vs. Glover. Dudley*..... 107
2. In a contract to pay money, in which it is expressly stipulated that

the instalments shall be paid at specified times, and that if any one instalment is not promptly met, the whole sum shall be due and payable; time is of the essence of the contract, and if the party agreeing to pay fails to do so, he is not entitled to relief in Equity. *Sneed et al. vs. Wiggins et al.* 3 *Kelly*..... 98

3. Where the contractors on a rail road were to complete their work within a given time, and the company were to furnish the cross-ties, mud sills, at convenient points along the road, and the wood and iron rails at the end of the finished part, no time being specified at which they were to be furnished: *Held*, that the company were bound to furnish them as needed, without any unreasonable delay. *Milnor & Co. vs. Ga. R.R. & B'k'ng Co.* 4 *Ga.*..... 390
4. In a promise by A to B, to pay so much money so soon as he can collect it out of C, by law, the qualification has reference to time and not to the solvency of C. *Woolbright vs. Sneed.* 5 *Ga.*..... 167
5. In an action by B, on such a promise, it is necessary for him to prove that a reasonable length of time has elapsed for the purpose of collecting the money since the promise. *Ibid.*
6. In a suit brought upon an instrument in these words: "for value received, I promise Gideon Hotchkiss, five hundred dollars at Hopkins & Hardeman's foundry at Augusta, said Hotchkiss' present account to go in part payment. The said castings to be taken at 6 cts. per lb: *Held*, that no time being fixed by the contract for the delivery of the property, that there must be a demand and refusal proven. *Hotchkiss vs. Newton.* 10 *Ga.*..... 560

See *Contract*, III. 4, 5.

TREASURER. See *County Officers*.

TRESPASS.

1. A plaintiff seeking to recover, for injury done his land by the erection of a mill-dam, cannot recover, where paramount title is shown in another, by his own evidence. *Morris vs. McCamy.* 9 *Ga.*..... 160
2. Where an immediate act is done by the co-operation, or the joint act of two or more persons, they are all trespassers, and may be sued jointly or severally, and any one of them is liable for the injury done by all. To render one man liable in trespass for the acts of others, it

- must appear, either that they acted in *concert*, or that the act of the party sought to be charged, ordinarily and naturally, produced the acts of the others. *Brooks vs. Ashburn.* 9 Ga..... 297
3. In an action of trespass for taking away personal property, if the plaintiff has the absolute or general property of the thing upon which the trespass is alleged to have been committed, it is not necessary for him to prove that he was in possession at the time of the trespass. *Crenshaw vs. Moore.* 10 Ga..... 384
4. A Court of Equity will not interfere to restrain a trespass by injunction, unless it be destructive to the very nature and substance of the estate, or unless irremediable mischief would ensue unless immediate relief was granted, or where, from the difficulty of the proof, or some other peculiar circumstance, this conservative remedy is imperatively demanded. *Cutching vs. Terrell.* 10 Ga..... 576
5. A and B were joint tenants of a lot of land; no partition had been made between them. It was understood, however, that A should have the east, and B the west end of the tract. B agreed that A might erect a mill on his, (A's) half, and cut as much timber off the west half, and overflow as much of the land as might be necessary for that purpose. Afterwards B sold to C, the latter having agreed expressly with A, to abide by these stipulations, which B exacted of him before he could consent to sell. After the dam was partly constructed, and timbers collected for building the mill, C sold to D, who shortly afterwards notified A to discontinue the work, and upon his refusal brought his action of trespass for the overflowing of his land by the back water : *Held*, that under the circumstances, the action could not be maintained, and that the original parol agreement could not be revoked after it had been executed at the defendant's expense. *Sheffield et al. vs. Cullier.* 3 Kelly..... 85
6. As to injunction to restrain a trespass. See *Equity, II.*

TROVER.

1. A sold B a carriage and harness, for which, A gave B a bill of sale; the property was not delivered at the time of sale, but A promised to deliver it; and in pursuance of such promise, carried it to the river with a view to put it on a boat to be carried to Augusta and delivered to B, which, however, was never done, nor his promise further complied with; B called on A for the delivery of the property, which A refused; B knew where the property was and might have taken it

- when he pleased: *Held*, that there was not such an actual or constructive conversion by A as to entitle B to maintain trover against him. *Roll vs. Black. Dudley*..... 18
2. Where negroes had been given to minor children, and the father sold them to A, and an action of trover was brought against A, to recover their value: *Held*, that the sale by the father was void, and that the action would lie. *Wilson et al. vs. Wright. Dudley*..... 102
3. A plaintiff in trover for certain slaves, required bail under the second section of the Act of 1821, entitled, an Act to quiet and to protect the possession of personal property, and to prevent taking possession thereof by fraud or violence. The defendant was arrested and the slaves seized by the Sheriff under the process, and being unable to give security under the Act, the plaintiff thereupon gave security under another provision of the same Act, and received from the Sheriff the possession of the slaves sued for. Afterwards, and without any trial, dismissed his action of trover, still retaining the possession of the slaves thus obtained. The plaintiff then sued the former plaintiff in trover for the same slaves, and insisted that his possession, obtained as aforesaid, was tortious: *Held*, that said possession was not tortious, but was a lawfully acquired possession, under said Act. *Smith vs. Kershaw. 1 Kelly*..... 259-61
4. To enable a plaintiff to maintain trover, he must have either a general or special property in the chattel, the actual possession or the right of possession. *Liptrot, Adm'r, vs. Holmes. 1 Kelly*.... 388 et seq.
5. On the death of a *feme covert* intestate, her separate estate vests in her legal representative, and he can maintain trover therefor, even where there has been a trustee appointed, for the sole purpose of protecting such property against the marital rights of the husband, during the coverture; the trust being considered as executed whenever the coverture ceases to exist. *Ibid*..... 388-392
6. The action of trover being founded on a conjunct right of property and possession, any act of the defendant which negatives or is inconsistent with such right, amounts in law to a conversion. *Ibid*.... 391-2
7. In an action of trover by an executor or administrator, who declares on his own constructive possession, and alleges the conversion after the death of the testator or intestate, it is necessary for him to introduce in evidence, his letters testamentary or of administration, on the trial, as a part of his title, to enable him to recover. *Robinson vs. McDonald. 2 Kelly*..... 119
8. Where the defendant purchased a negro at Sheriff's sale as the property of a third person, who was a stranger to the plaintiff's title, used

him as his own, and exercised dominion and control over him, it was held to be sufficient evidence of a conversion to maintain trover, without evidence of a demand and refusal. *Ibid.*

- . Trover, as a general rule, will not lie by a tenant in common against his co-tenant. *Hall vs. Page.* 4 Ga..... 423
0. Where an action of trover is brought by trustees, in whom the legal title is vested, for the recovery of a negro, the allegation that they sue "for and in behalf of one of the *cestui quet trust*," is surplusage, the trustees being the real parties. *Schley vs. Lyon and another.* 6 Ga..... 530
1. The Supreme Court will not interfere with the established practice of the Circuit Courts of Georgia, in relation to the alternative form of the verdict in trover. *Foster vs. Brooks, Adm'r.* 6 Ga..... 287
2. A count in trover, in the usual form, is not demurrable. The Statute of 1847, prescribing a form of declaration to recover personal property, is permissive only, and not compulsory. *The Mayor, &c. Columbus vs. Howard.* 6 Ga..... 213
3. In actions of trover, where there is conflicting evidence of the value of the property at the same time: *Held*, that the Jury may find the highest value proven, but are not compelled so to find; the *true value*, derived from all the evidence, being the criterion generally of the damages. *Foster vs. Brooks, Adm'r.* 6 Ga..... 287
4. In trover for a slave, the measure of damages, as a general rule, is the value of the property at the time of the conversion, and the value of the hire of the negro since, up to the time of the trial. *Schley vs. Lyon and another, Trustees.* 6 Ga..... 530
5. Where the property sued for is not of a fixed value, but fluctuates in price, evidence may be given of the value at the time of the trial. *Ibid.*
6. In trover by a *bailee* against the *general owner*, the measure of damages is the value of his special property only; but where the action is against a *stranger*, or wrong-doer, the measure of damages is the full value of the property—the *bailee* holding the balance beyond his own interests for the general owner. *Ibid.*
7. Possession of property, with a claim of title adverse to that of the true owner, is sufficient evidence of conversion. *Maxwell vs. Harrison.* 8 Ga..... 61
8. The Macon & Western Railroad Company took on board their cars the slave of H. having a general pass, and without the knowledge and

consent of H. to transport him to a given point, for the usual fare for negroes: *Held*, that this was a conversion of the slave, and that the company are liable for all the injuries which he received, whether they occurred by the negligence of the company or otherwise. *The Macon & W. R. R. Co. vs. Holt.* 8 Ga..... 157

TRUSTS AND TRUSTEES.

1. Where A executed a deed of gift in which certain goods and personal chattels were conveyed to B, in trust for the payment of A's debts, with the remainder to B, the Court *held* that no person but the creditor or the grantor could interfere with the rights and interests of the trustee. *Evans vs. Lumkin et al. Dudley* 193
2. A Court of Chancery, on sufficient grounds being shown, will remove a trustee under a marriage settlement, and appoint a new one. *Gale et ex. R. M. Charl*..... 109
3. If the original trustees are dead, the fact that the representative of one is temporarily absent, and the representative of the other unwilling to act, is not, *per se*, sufficient to justify the substitution of new trustees; the Court has power to compel such representatives to assume the trusts. *Ibid.*
4. But the Court may, with the assent of all parties, substitute new trustees. *Ibid.*
5. But to justify the removal of such representatives as trustees, their refusal or incapability must be shewn, either by answer to the petition for substitution, by affidavits of petitioners or neglect of representatives to shew cause on proper citation. *Ibid.*
6. Property wrongfully with the trust fund, may, at the option of the *cestui que trust*, be pursued in the hands of the trustee, or those in privacy with him, and be held subject to the terms of the original trust. *Martin et al. vs. Greer et al. Ga. Dec. part I.*..... 109
7. An express trust, against which the Statute of Limitations does not run, may be created by parol. *Ibid.*
8. The possession of the executors of a trustee, is the continuation of the trustee's possession, and the Statute does not run in their favor. *Ibid.*

9. A security of an administrator, to whom a note is transferred, that was given for part of the intestate's estate, is a trustee, *quoad hoc*, for creditors and distributees. *Carnes et al. vs. Jones et al. Ga. Dec. part 1.* 170
10. If the note be sued to payment by the security, in his own name, he is still a trustee; and it is no ground of objection that the action of law was not defended. *Ibid.*
11. It is not a ground of objection to a decree in favor of distributees, that there may be creditors having a higher claim; they have the same remedy on the bond that the distributees have. *Ibid.*
12. A trustee may change the investment of a trust estate, where it is clearly for the interest of the *cestui que trust*. *Cornwise, Compt. vs. Bourqum. Ga. Dec. part II.*..... 15
13. But without an order of Court, he does so, at his own risk. *Ibid.*
14. A trustee will not be allowed to encroach on the capital, for the maintenance of the *cestui que trust*, but under very peculiar circumstances. *Ibid.*
15. William Pelot conveyed, by deed, certain slaves to Levi S. D'Lyon, in trust, for the sole and separate use of his wife, Elvina R. Pelot, during her life; and after her death, to her children. The deed authorized the *cestui que trust*, Mrs. Pelot, by and with the advice and consent of her trustee, to sell and dispose of the estate, whenever she shall deem it proper to do so, and to re-invest the proceeds, &c. Mrs. Pelot purchased from Augustus Myddleton a tract of land, the growing crop thereon, and also the stock of cattle, and hired the services of three negroes belonging to Myddleton, till the close of the year, to assist in the crop, for the sum of \$1,476. Two notes were given by her, for the amount, to be secured by a mortgage on the four slaves embraced in the trust deed, and by a mortgage on the land: *Held*, that it was competent for Mrs. Pelot to make this contract. *Wayne, Trustee, et al. vs. Myddleton et al. 2 Kelly.*..... 402
16. Where the testator leaves something to be done by the trustee, *as to convey*, it is an executory trust. *Edmondson and Wife vs. Dyson. 2 Kelly.*..... 312
17. When property is bequeathed to A, in trust, for the use of B, during his natural life, with instructions to the trustee to convey it to whomsoever he shall by will appoint; and if he dies intestate, then to convey the property to the heirs at law of B, absolutely, and B dies intestate: *Held*, that this is an *executory trust*, to which the rule in Shelly's case does not apply, and that the heirs at law of B, take as purchasers, and not as heirs, in course of administration. *Ibid.*..... 320

18. Trusts in personal property may be created and proven by parol declarations. *Kirkpatrick, Guardian, vs. Davidson.* 2 *Kelly*..... 299
19. If A buy land from B, and pay down the entire consideration or purchase money, and take an unconditional bond for titles, and there is nothing more for him to do in order to consummate the contract, B is a mere naked trustee, and the legal estate vests in A, if not under the 27th *Henry VIII.* commonly called the Statute of Uses, yet, it comes within section 10 of the 29th *Charles II.* chap. 3, on an execution and judgment against A at Law. *Pitts vs. Bullard.* 3 *Kelly*... 10
20. Where property, held under an implied trust, is liable, at Law, to levy and sale, under execution, against *cestui que trust.* *Ibid.*
21. When property vested in trustees, for the use of the husband during his life, he to have the entire *possession*, to exercise *reasonable ownership* over the same, and to alter and change the same, by and with the consent of the trustees, provided it was for the benefit and advantage of the trust estate; but if the wife survived the husband, she was to have the entire use, during her natural life, with power to dispose, by will, of one half; and in the event of offspring between them, the *whole estate to vest in said child or children*, the trustee to have the right, at any time, to re-settle the property, with the consent of both husband and wife, which was afterwards done, so far as to allow the wife the right to dispose of a moiety of said estate, in any event; and at the death of the husband, he surviving the wife, and there being no offspring, the trust to cease, and the legal to unite with the equitable estate, and descend to the heirs at law of the husband: *Held*, that the legal title remained in the trustees, and that the equitable interest of the husband in the property, was not liable to be seized and sold by the Sheriff, under an execution at Law, and that the proper remedy for the creditors was in a Court of Equity. *Blake vs. Irwin.* 3 *Kelly* 366
22. The mere possession of personalty by the *cestui que trust*, does not amount to an execution of the trust, especially if the interests of *remainder-men* are affected. *Wynn vs. Lee.* 5 *Ga.*..... 217
23. Where, by a deed of trust, the sum of \$15,000 was raised by the voluntary contributions of certain residuary legatees, and vested in a trustee, subject to certain trusts, one of which was, that the sum of \$5,000, and no more, should be appropriated for the payment of the debts of the *cestui que trust*, then owing, the said trustee to judge of the justness of the debts which might be presented for payment, and of the order and proportion in which the same should be paid: *Held*, on a bill being filed by the *cestui que trust*, alleging that all his debts had been paid by the trustee, and that there remained in his hands

- the sum of \$3,000 of the \$5,000 placed there for the payment of his debts, that the *cestui que trust* was entitled to an account from the trustee therefor, and to have the same invested for his benefit. *Napier vs. Napier*, 6 Ga....., 404
24. Where, under a trust deed, something is required to be done by the trustees to accomplish the objects of the trust, the trust is executory, and not executed. *Schly vs. Lyon and another, Trustees, &c.* 6 Ga.. 530
25. Where an action of trover is brought by trustees, in whom the legal title is vested, for the recovery of a negro, the allegation that they sue "for and in behalf of one of the *cestui que trust*," is surplusage, the trustees being the real parties. *Ibid.*
26. A testatrix bequeathed as follows: "I give and bequeath to my son, Anthony R. Thornton, a negro woman, &c. in trust, for the use and benefit of M. G. T. wife of my son Benj. H. T. during her natural life; and after her decease, for the use of their children, now living, or which may hereafter be born to them, and their heirs forever: Held, that upon the death of the tenant for life, the trust was executed and the children were absolute owners of the property. *Jordan vs. Thornton et al.* 8 Ga..... 517
27. The power of a trustee over the legal estate or property vested in him, properly speaking, exists only for the benefit of the *cestui que trust*. It is true, nevertheless, that as the legal owner, he may do many acts to the prejudice of the *cestui que trust*. He may even dispose of the estate or property to a *bona fide* purchaser, for a valuable consideration, without notice of the trust, so as to bar the interest of the *cestui que trust* therein. *Papot vs. Gibson.* 7 Ga..... 533
28. Where E. advances to T. money to purchase a tract of land, in consideration that T. would secure the ferry right in the land to E: Held, that an implied trust is created, as to the ferry right, and that T. holds it as trustee for E. *Williams vs. Turner and another.* 7 Ga..... 296
29. A naked trustee is a competent witness in an action to which he is not a party. *Hardwick vs. Hood, Receiver.* 8 Ga..... 354
30. Trust estates are liable to pay out of their income, for goods or services furnished or rendered, and such as are necessary and proper. *Wylly et al. vs. Collins & Co.* 9 Ga..... 223
31. A creditor is not bound to ascertain whether the trustee is, or is not in arrears to the trust estate. *Ibid.*
32. The rule in South Carolina, to this effect, ought not to be adopted in Georgia, where no returns are made by trustees, other than executors,

administrators and guardians, of their receipts and disbursements. *Ibid.*

33. Future income may be applied to past indebtedness. *Ibid.*
34. A wife and children who have separate property settled upon them, are not bound to support the husband and father, though owing to his insolvency they may be bound to support themselves. *Ibid.*
35. The registry of the deed of settlement, accompanied by the management of trust property by the husband is, as to third persons, evidence of his agency for the trust property. *Ibid.*
36. Although the husband, as such, has no right to control the separate estate of his wife, yet he may, like any other person, do a ministerial act, such as purchasing goods for the trust estate. *Ibid.*
37. Taking the note of the manager of the trust estate, *in settlement* of the account for goods debited to the manager individually but which went to the use of the *cestui que trusts*, does not relieve the trust estate from liability to pay out of its income, where it does not appear that exclusive credit was given to the agent. *Ibid.*
38. Where a particular mode is pointed out, in the marriage settlement, for the disposition of the separate estate of a married woman, she cannot dispose of it in any other way; as where she had power to dispose of it by will, with the *consent and approbation* of her *trustee*, such consent is necessary to the validity of a will made by her. *Weeks and Wife vs. Sego and another.* 9 Ga..... 199
39. A Judge at Chambers has no power, upon petition, to order a sale of trust property. *Arrington vs. Cherry.* 10 Ga..... 429
40. It is competent for the trustee to sell the trust property, by and with the consent and approbation of the *cestui que trusts*, provided there be no restriction upon his powers in the deed, and no limitation over to children or third persons. *Ibid.*
41. In order to raise a trust, by the promise or agreement of a party, which a Court of Equity will execute, it must be founded on some *meritorious* or some *valuable* consideration. *Yarborough et al. vs. West.* 10 Ga..... 471
42. A trust of personalty may be created and proven by parol. *Gordon vs. Green.* 10 Ga..... 534
43. No particular form of words is necessary to create a trust. It will

be sufficient if the intention be manifest, that the donee shall not have the sole beneficial interest in the property. *Ibid.*

44. A remainder in personalty cannot be created by parol, but a remainder of personalty in trust may be proven by a declaration of the trust, in writing, made by the trustee, setting forth the nature and objects of the trust clearly and distinctly. *Ibid.*
45. The answer to a bill in Chancery, filed by the party, charging a remainder by parol in trust, against the trustee, which clearly admits the nature and objects of the trust: *Held*, to be admissible to sustain the remainder, in an action by the *cestui que trust*, against the trustee, for the trust fund. *Ibid.*
46. It was agreed between A and B, that if B would undertake the management of A's affairs, and collect in certain funds due to her, that "B should retain out of the first money received, the amount of \$1000—\$500 of which was to be his then, and the remaining \$500 he was to retain and use as his own; but at her death, was to pay over to C the amount of \$500, without interest." *Held*, that the agreement created a gift to B, in trust for the use of C, to be paid to C at the death of A, without accountability for interest. *Ibid.*
47. Also, that the gift was perfected so soon as the fund was collected by B, and was then irrevocable. *Ibid.*
48. Also, that in an action by C against B, for this fund, after the death of A, a count charging that B was indebted to C, in so much money received from A, for the use of C; was sufficient to let in evidence, the answer of B to a bill in Equity filed by A against B, in which B sets forth the agreement before recited, and admits the funds in his hands; and farther, that it was not a good objection to the admissibility of B's answer, that the bill and decree in the case was not also put in evidence by C, the plaintiff in the action. *Ibid.*
49. Where the purchase money is paid by A, and the titles made to B, the property is subject to levy and sale under executions against A, and the creditor need not go into Equity, but may proceed at Law. *Field et al. vs. Jones and another.* 10 Ga..... 229

See *Equity*, I.; *Limitation of Actions*, III.

USES. See *Trusts*, &c.

USURY.

1. The equitable powers of the Superior Courts of Georgia, in suppressing frauds, will be exercised in aid of a mortgagor seeking to be relieved from a usurious contract, notwithstanding that the Judiciary Act points out a method by which he may, at Common Law, dispute the sum due. *Irwin vs. Ham, &c. R. M. Charl.*..... 70
2. Though a bond and mortgage have been assigned, if the bill alleges that such assignment was colorable, and that the assignee had notice of the usury pervading the original contract, in the absence of a specific refutation of such allegations, the Court will grant an injunction. *Ibid.*
3. On proof that usurious interest is added into and constitutes a part of the consideration of a note sued on, a verdict cannot be rendered for the whole amount; the interest must be deducted. *Vernon vs. Miles. Ga. Dec. part I.*..... 73
4. In the plea of usury, the sum loaned, the time when it took place, and the amount of usury taken and received, are material facts. *Winkler vs. Scudder. 1 Kelly.*..... 134
5. All usurious contracts in Georgia, under a just construction of the Act of 1822, are void, as to the legal and usurious interest. *Ibid.*.... 125
6. In a suit upon usurious contract, payments proved to have been made, the usury being established, will be deducted from the principal sum originally loaned. *Ibid.*
7. Usury paid by a surety, may be recovered back by him, in an action for money had and received, but not by the principal, though he has re-imbursed the security. *Whitehead vs. Peck. 1 Kelly* 150
8. If the surety have knowledge of the usury, and voluntarily pay it, he cannot afterwards recover it of his principal. *Ibid.*
9. Excess of usury, over and above the principal and legal interest, voluntarily paid, may be recovered back; or, under proper circumstances, it would be a good defence under a plea of set-off. *Rackley vs. Pearce. 1 Kelly.*.....242-3
10. The plaintiff had two notes of the defendant, the one infected with usury, and the other not. The defendant paid \$1,800, out of which the usurious note was extinguished, and the balance applied to the

- note not thus tainted with usury, which was afterwards renewed at 16 per cent. In a suit upon the last mentioned note, the usury paid upon the first cannot be withdrawn and applied as a credit, under a plea of payment. *Ibid.*
11. Upon a rule to foreclose a mortgage, the mortgagor may show, by way of defence, that the contract upon which it was given, was usurious. *Bailey vs. Lumpkin.* 1 *Kelly*..... 403-5
 12. Neither legal nor usurious interest can be recovered at Law, in Georgia, upon a contract tainted with usury. *Ibid.*.....406-7
 13. A security infected with usury, is void in Georgia, *quoad* the legal interest, together with the usury, even in the hands of an innocent holder, without notice. *Ibid.*..... 407-8
 14. The maker of a usurious note, is not barred of the defence of usury, by standing by when it was transferred to an innocent holder, and not disclosing the fact of the usury. *Ibid.*.....,..... 408-9
 15. In a case where the original transaction was usurious, and several renewals have taken place, and part of the interest reserved has been paid, the infection of usury follows all the securities given in renewal for the same debt, however varied in form and amount; and the amount paid on such renewals, must be deducted from the original amount loaned. *Ibid* 409
 16. Usurious contracts may be purged, as for example: where there is an accounting, between the parties, to a usurious contract, and all sums previously paid, usuriously, are deducted, and a new security given for the balance, the contract is said to be purged, and the last security taken is valid. *Ibid.*..... 410
 17. In the case of a note, given by way of renewing and continuing an original contract for a usurious loan, the mere change of securities does not purge it of the usury. *Hammond et al. vs. Buys.* 1 *Kelly*.. 417
 18. But if A, as the maker of a usurious note, is about to pay it up to B, the payee and holder, and C, for the purpose of using the money for his own benefit, borrows A's note from B, and gives B his (C's) own note, with A as his security, there being no usury in the transaction between B and C, the note of C, with A security, thus substituted, would not be obnoxious to the Statute of Usury. *Ibid.*
 19. If usury is paid by a surety to a contract, cognizant to its being usurious, he cannot recover the usurious interest from his principal. *Har- graves et al. vs. Lewis.* 2 *Kelly*..... 167

20. A judgment creditor upon a usurious contract comes into a Court of Equity, seeking to have his debt satisfied out of the money in the hands of the assignees, arising from the sale of the insolvent's property, upon which he had a lien at Law, which he waived; consenting to the sale, upon the assurance of the trustees, made in ignorance of the usury, that his claim should be paid: *Held*, that the usury may be set up by way of answer to the bill, provided a sufficient excuse be rendered, why the original debtor did not avail himself of this defence at Law; and if sustained by proof, the judgment shall be displaced for the usury, and only stand against the trust fund, for the principal and legal interest due on the original loan. *Nisbet vs. Walker*. 4 Ga... 221
21. The Act of 1842 applies to administrators and executors, as well as the original parties. *Persons vs. Hight*. 4 Ga..... 474
22. If the affidavit of the plaintiff denies any knowledge of the facts, as stated in defendant's plea, or that the contract is usurious—this is not such a *failure* to discover as will allow the defendant to read his own affidavit to the Jury. *Ibid*. WARNER, J. *dissenting*.
23. The discovery should be as complete as if it were an answer to a bill in Equity, filed for that purpose. WARNER, J. *dissenting opinion*. *Ibid*.
24. The right to recover back money paid on a usurious contract, accrues from the actual payment, and not the agreement to pay. *Rushing vs. Rhodes*. 6 Ga..... 228
25. A note originally usurious may be purged of the usury, by agreement of the parties, as where new notes were given for the principal sum loaned, with the lawful interest added to the principal at the time of each renewal: *Held*, that an agreement to pay interest on interest that was lawfully *past due*, did not constitute usury; and that each renewal of the note was a new contract. *Pinckard vs. Ponder*. 6 Ga..... 253
26. Where a suit was pending on a note, between M and T & C, and T was about to file a plea of usury, and it was agreed between M and T, that if T would withdraw his plea of usury, and let judgment be rendered against T & C, that M would not collect the judgment out of T, until he had exhausted all the property of C, and M failed to comply with his agreement: *Held*, that the breach of the agreement by M, was no ground for a Court of Equity to open and impeach the judgment, on the ground of usury in the note on which it was founded. *Mays and another vs. Taylor*. 7 Ga..... 233
27. If a surety to an usurious contract pays usurious interest, knowing

- it to be such, he cannot recover it back out of his principal. *Jones vs. Joyner et al.* 8 Ga..... 562
28. At Common Law, a contract which is not tainted with usury in its inception, is not made usurious by a subsequent agreement to pay usury in consideration of forbearance. *Troutman vs. Barnett et al.* 9 Ga..... 30
29. Under our Statutes, if a judgment not tainted with usury is transferred, and the transferee agrees with the defendants to forbear its collection for a term of time, in consideration of usurious interest paid him, such subsequent agreement is usurious, and affects the judgment so far as to make the principal due thereon, only collectable. *Ibid.*
30. The defendant is not bound to pay up the money lent, with lawful interest thereon, in order to entitle him to read the answers of the plaintiff to interrogatories taken under the Act of 1847, in support of his plea of usury. *Zeigler vs. Scott, Adm'r.* 10 Ga..... 389
31. In Equity, the rule requiring the payment of the principal and lawful interest, is a condition to the relief sought, and not to the discovery. *Ibid.*
32. Although the usury could be proved by *aliunde* testimony, still the borrower is not entitled to relief, except upon the terms of paying up the principal and legal interest. *Ibid.*
33. Usury paid on a former contract, may be pleaded as a set-off to the existing debt, provided it be not barred by the Statute of Limitations. *Ibid.*
34. In an action of assumpsit for money had and received, the borrower can only recover the usurious gain or excess. He is entitled to no more by way of set-off. *Ibid.*

VARIANCE. See *Evidence*.

VENDOR AND PURCHASER. See *Sale*.

VENDOR'S LIEN. See *Lien*.

VERDICT.

1. As a general rule, the verdict of a Special Jury is final and conclusive; but where, on a bill for specific performance, the Jury decreed that the seller should give good and sufficient titles to the buyer, the question of the sufficiency of the titles tendered, is to be decided by the Court. *Ross vs. Grimbail. T. U. P. Charl.*..... 273
2. The decree of the Special Jury may mould itself to all the purposes which the justice of the case requires. *King vs. Cook. T. U. P. Charl.* 289
3. Where no rule of law has been violated, and the Jury acted within their appropriate sphere, the Court will not disturb their verdict, unless in extraordinary cases. *Wilson et al. vs. Wright. Dudley.*..... 102
4. Where there have been two concurring verdicts, unless there has been something grossly and manifestly wrong and unjust in them, they should not be disturbed by the Court. *Cumming vs. Fryer. Dudley.* 183
5. Upon an issue formed between an insolvent debtor and his creditors, of "fraud or not fraud," the Jury should find the affirmative or negative of the issue. A general verdict of "guilty," is improper and illegal. *Ex parte Simpson. R. M. Charl.*..... 111
6. Where there are two parties plaintiff, the Jury cannot find a verdict against one and in favor of the other. *Hunt vs. Gamble. Ga. Dec. part I.*..... 156
7. It is no ground of error that the foreman of a Jury omits to sign his name in full to the verdict, where the parties are present and no objection made. *Malony vs. Harkey. Ga. Dec. part II.*..... 139
8. In an action of trover by several plaintiffs of different ages, and the Statute of Limitations pleaded, it is not error in the Court to charge the Jury that they might find a verdict in favor of those not barred, and against those who are; and the verdict should specify which of the plaintiffs the Jury find for, and which against; otherwise, the verdict would be imperfect in not finding all the issues submitted. *Settle vs. Allison et al. 8 Ga.*..... 201
9. When the verdict is imperfect in not finding for or against a portion of the plaintiffs: *Held*, that after it has been received and recorded, and the Jury discharged from the further consideration of the cause, it is error in the Court, after the expiration of four days, to re-assemble the Jury and amend the verdict according to what they stated it was their intention to find—such intention not appearing on the face of the verdict. *Ibid.*

10. Where the Jury in an action of trespass against two joint trespassers, returned the following verdict: "We the Jury, find Simpson, \$150, and Edwards, \$100, and all the costs to be paid by Simpson and Edwards; and fifty dollars damages to be paid by Simpson:" *Held*, that the legal effect of the verdict was, that the Jury intended to find \$200 damages against Simpson, the principal trespasser, and that a joint judgment should be entered against both defendants for that amount; and a remittiter entered as to the \$100 found against Edwards. *Simpson and Edwards vs. Perry.* 9 Ga..... 508

11. Verdicts are to have a reasonable intendment, and to receive a reasonable construction, and are not to be avoided unless from necessity. *Simons et al. vs. Rarden and Wife.* 9 Ga..... 543

12. Where a bill was filed by John A. Rarden and Henrietta, his wife, (formerly Henrietta G. Ogletree,) to recover certain slaves in right of his wife, and the Jury on the trial of the cause, found the following verdict: "We the Jury find and decree, that the complainant, Henrietta G. Rarden, (formerly Henrietta G. Ogletree,) in her own right, and for her own use, do recover of the defendant, the negro slaves, &c." *Held*, on a motion in arrest of judgment, on the ground that the verdict did not find in favor of the marriage of the parties, which was denied by the defendant's answer, that the legal effect of the verdict was in favor of the marriage. *Ibid.*

13. Where a verdict was rendered in a claim case, in which the plaintiff had been dead four years, and whose estate was unrepresented before the Court: *Held*, that the verdict ought to have been set aside, on motion. *Ellis vs. Francis.* 9 Ga..... 835

14. If some of the counts in the indictment be good, and others defective, and a general verdict of "guilty" be returned, the intendment of the law is, that the Jury find the charge in the good counts to be true, and judgment will be rendered by the Court thereon. *Bullock vs. The State.* 10 Ga..... 46

15. Where there are several counts in the indictment, charging different grades of the same offence, with punishments differing in degree only, but of the same nature, and the Jury return a general verdict of "guilty," the judgment will not be arrested, but the Court will award judgment for the highest grade of the offence charged in the indictment. *Ibid.*

VOLUNTARY CONVEYANCES. See *Sale, I.*

WAIVER. See *Equity, VII. Lien, II. 5, 6, 7. Pleading, V.*

WARRANT.

1. A warrant for the arrest of a person charged with crime, should be under seal. *State vs. Caswell. T. U. P. Charl.*..... 280
2. A bastardy warrant, reciting that the defendant has been charged, upon the examination of a single woman, with being the father of a bastard child, is admissible in evidence to prove the arrest, although it does not specify that he was brought before the Justice to give security. *Walker vs. State. 5 Ga.*..... 491
3. As to Distress Warrant, see *Landlord and Tenant.*

WARRANTY.

1. A sale of special interest in land, does not amount to a warranty of title; and if the relinquishment to the purchaser simply recites the promise of a third person to make title, this will not constitute a warranty. *Jordan vs. Adm'r of Jordan. Dudley*..... 181
2. In the case of a warranty, it is not necessary that there should be a recovery against the warrantee by his vendee, in order to entitle him to sue his vendor on the warranty. *Broughton vs. Badgett. 1 Kelly.* 77
3. A warranty in a bill of sale, is not negotiable by indorsement, so as to vest in the indorsee a right of action upon it. *Ibid.*
4. A warranty of title in a deed, is such a covenant against incumbrances as will be broken by a claim of dower. *Leary vs. Durham. 4 Ga.* 593
5. Such a covenant runs with the land. *Ibid.*
6. The judgment of the Court, confirming the report of the commissioners appointed to lay off and admeasure dower, is sufficient proof of an eviction. *Ibid.*
7. A fraudulent combination between the covenantee and the plaintiff in ejectment, will preclude the idea of an eviction, upon title paramount. *Davis et al. vs. Smith et al. 5 Ga.*..... 274
8. The eviction, to constitute a breach of the warranty of title, must be founded on a title paramount. *Ibid.*

9. The measure of damages for the breach of a covenant of warranty of title, is the purchase money, with interest from the time of the sale of the land. *Ibid.*
10. If a company, composed of A, B and C, sell personalty with implied warranty to D, E and F, and D, without a title from D, E and F, or from any one claiming under them, sells the same property to A, and he is dispossessed, and sues D on an implied warranty; if A had knowledge of the defect of the title at the time he bought from D, there is no implied warranty from D to A. And if, in such a case, there is an implied warranty, it may be avoided for fraud, in A's suppression of the fact that the title was not good. *Sibley vs. Beard.* 5 Ga 550
11. A sells a tract of land to B, taking his notes for the purchase money, and giving his bond for titles when the purchase money is paid; A receives one half the purchase money; when B sells the land to C, executing his deed with a warranty of title; C buying *bona fide* for value, without notice that the legal title is in A. After the sale to C, and with knowledge of that fact on the part of A, A and B enter into a verbal agreement, that in payment of the balance of the purchase money due from B to A, B shall take up a note made by A to D, by substituting his own therefor, with A as his security; and that if A is compelled to pay the debt thus made by B to D as surety, then the purchase money due from B to A on the original sale of the land, shall be again considered as due, and A shall hold the legal title to the land as security for its payment. A pays the surety debt to D, and sues for and recovers the land from C; B dies, and the administrator of B files his bill, asking direction of Chancery as to the distribution of the assets among the creditors; A and C are both made parties to the bill and answer. A claims to be paid his purchase money; C claims to be paid his damages for the breach of the covenant of warranty: *Held*, that the substitution by B of his note, in lieu of A's note to D, is a payment of the purchase money due by B to A; and if the verbal agreement is considered as of force, then, in Equity, A is not entitled to be paid out of the assets of B, his purchase money; and further, that A having *elected* to rescind his original contract with B, by resorting to his legal title, and evicting C, by which the estate of B is made chargeable upon his warranty to C, A is to be held to his election, and shall refund to the estate of B the amount of the purchase money which he has received, with interest. *Davis et al. vs. Smith et al.* 5 Ga..... 274
12. A judgment properly rendered in another State, with an eviction under it, is evidence of a breach of warranty in Georgia. *Ibid.*
13. In an action by an assignee, on the following instrument: "I agree to take of Burr, Mize¹ & Co. a fifty-saw cotton gin, cast-steel saws,

fine teeth, and improved brush, nine inches in the circle; the gin to be delivered at my house by 1st September next. The said Burr, Mizell and Co. warrant the said gin to perform well in every respect, or they will make it do so at their own expense. For which I promise to pay Burr, Mizell & Co. or bearer, one hundred dollars, by 1st January, 1847." *Held*, that failure of consideration might be pleaded and proved. *Hodges vs. Hall*. 5 Ga 163

14. In the sale of a slave, where there is a contract of warranty, the purchaser may consider the contract as a nullity, and bring his action on the case for deceit; and in such action it is not necessary that he should set forth the contract. *Dye vs. Wall*. 6 Ga..... 584
15. A warranty of a slave to be *healthy*, does not extend to a warranty of soundness of mind, but of body only. *Nelson vs. Biggers*. 6 Ga.. 205
16. A debt, to come within the law of set-off, must be a money demand of a liquidated nature, and for which *indebitatus assumpsit*, or some other action, *ex contractu*, will lie. A right of action for breach of warranty is not such a debt. *Crenshaw vs. Jackson*. 6 Ga..... 509
17. To entitle the vendee to recover of the vendor for a breach of warranty of the soundness of negro children whose mother was proven to have died of consumption, it is necessary to show either that the disease was hereditary in the family, or that the children were born subsequent to the actual existence of the complaint in the mother. *Dean vs. Traylor*. 8 Ga..... 169
18. Where a suit was instituted on a promissory note, and defendant pleaded a *total* failure of consideration, and alleged a *parol* warranty of the property for which the note was given, as a part of his defence: *Held*, that the plaintiff could not avoid this defence, by insisting on the Statute of Limitations, although more than four years had elapsed from the time of such parol warranty. *Morrow vs. Hanson*. 9 Ga... 398
19. When land has been conveyed with covenants of warranty, and the land has passed, by subsequent conveyances, through the hands of various covenantees, the last assignee in whose possession the land was when the covenant was broken, has a right of action against any or all of the prior warrantors, whether immediate or remote, for breach of covenant. *Redwine vs. Brown et al.* 10 Ga..... 311
20. The covenants of seizure and of right to convey, and that the land is free from incumbrances, are personal covenants, not running with the land or passing to the assignee. The covenant of warranty, and the covenant for quiet enjoyment, are in the nature of real covenants, and

run with the land conveyed, descend to heirs, and vest in assignees of the purchaser. *Ibid.*

21. Does this distinction exist in this State, where all *choses in action* are assignable? *Quere. Ibid.*

22. The fact that the covenant does not name the assignees, does not prevent them from suing. *Ibid.*

23. An assignee, notwithstanding he has taken a warranty from his immediate bargainors, upon eviction, has a right to sue the original or any intermediate grantor upon his warranty. *Ibid.*

24. Upon a conveyance without warranty, all deeds, warranties, covenants and other muniments of title belong to the grantee, as appurtenant and incident to the land granted. *Ibid.*

25. Real covenants, or such as run with the land, may be assigned as well by a release and quit claim, as by deed of bargain and sale. *Ibid.*

26. The assignee under a Sheriff's sale, is the assignee of the original party; as much so as if the latter had assigned to him directly; it is part of the debtor's "right, title and interest in the premises." *Ibid.*

27. So too of an official sale of real estate, made by an administrator, under a license from the Ordinary, "with all the rights, members and appurtenances thereto belonging, or in anywise appertaining;" the purchaser is put in the same situation that the intestate was in. *Ibid.*

See *Covenant*.

WAYS.

1. Where a *certiorari* was granted and sustained against the commissioners of the road, and there was no allegation that they acted corruptly or with design to oppress, they were held not to be individually liable for costs. *Nunnerly vs. R. Conn. Dudley*..... 192

2. The owner of land appropriated for a highway, retains the freehold in the soil, and subject to the easement, and not interfering with it, may use the land in any manner, and maintain ejectment, trespass or waste, for any exclusive appropriation of it by another. *Mayor, &c. of Savannah vs. Steamboat Co. &c. R. M. Charl*..... 342

3. And the Statute of Georgia, which directs compensation to be made to the owners of land laid out for a highway, must be taken to provide for the purchase of the easement, and not of the land. *Ibid.*
 4. As a general rule, the freehold in the highway must be taken to belong to the proprietors of the adjoining soil. *Ibid.*
 5. But this rule, being founded on the presumption that such way was originally taken out of the lands of the party who hath other lands adjoining, is not applicable, when such presumption cannot arise from the facts shewn. *Ibid.*
 6. The State may construct public works, such as roads and bridges, by taxation, or the personal labor of its citizens, or through the instrumentality of individuals or corporations. *Young vs. Harrisons.* 6 Ga. 130
 7. The Act of 1834, authorizing the Inferior Courts to grant the right of private ways, in certain cases, containing no provisions for making any just compensation to the owners of the land through which it might pass: *Held*, to be unconstitutional and void. *Brewer vs. Bowman.* 9 Ga..... 37
 8. The laws of this State authorizing the opening of public roads over unenclosed lands, without just compensation: *Held*, to be void. *Parham vs. The Justices, &c.* 9 Ga..... 341
 9. Under the laws of Georgia, which authorize the laying out and opening of public roads over the enclosed lands of the citizen, the Inferior Court may order a review, for the purpose of determining whether a road be necessary or not, and may also order the same to be opened before compensation is made or tendered; but cannot enter upon and seize, and permanently appropriate the land, until compensation is made or tendered. *Ibid.*
 10. A citizen cannot enjoin the opening of a public road over his enclosed lands, when it appears from his bill, that he has not taken the steps pointed out by the law to procure the assessment of his damages. *Ibid.*
 11. Nor upon the ground that the reviewers appointed by the Court signed the petition for the road, and took an active interest in getting it up. *Ibid.*
 12. Nor upon the ground that it does not appear from the return of the reviewers that they were not sworn according to the requirement of the Statute. *Ibid.*
- WIDOW. See *Administrators, Executors, &c. V. Dower.*

WIFE'S EQUITY.

WILLS.

I. GENERALLY.

II. EXECUTION AND PROBATE.

I. GENERALLY.

1. A testator may limit the extent of power conferred by him, and prescribe the particular manner of executing it, and the agent is as little able to vary the manner, as to transcend the limit; for in either case he would be found usurping instead of executing authority. *Mackey et al. vs. Moore, Ex'r, &c. et al. Dudley*..... 95
2. It seems that the will of a *feme covert* will have no efficacy, unless there be an agreement before marriage, giving her the power to make such will, or such right has been conferred on her after marriage, or by some act analagous to an agreement before marriage. The mere parol assent of the husband is not sufficient to give such a will validity. *McGowan vs. Jones et al. R. M. Char*..... 184
3. In the construction of wills, the intention, so far as it is consistent with the laws of the land, shall govern. *Choice vs. Marshall. 1 Kelly*... 102
4. An instrument purporting to be a deed, by which the grantor gives to his son certain property after his death and the death of his wife, is not a deed, but a testamentary paper, and cannot be read to the Jury in any case affecting the title to personalty, in a Court of Common Law, until it has passed to probate before the Ordinary. *Hester, Ex'r, vs. Young. 2 Kelly*..... 44
5. A paper having the formalities of a deed may, notwithstanding, be a will. *Ibid.*
6. In determining whether an instrument be a deed or a will, the Court will not consider what the maker believed it to be, but what, in point of law, it is. *Ibid.*
7. The intention of the maker as to the character of the estate conveyed, is the criterion by which the Court will determine whether a given paper is a deed or a will, and if the intention, gathered from the whole paper, is, that the estate is not to pass, or the instrument to take effect until his death, it is a will and not a deed. *Ibid.*..... 49
8. The proper test to determine the character of an instrument, whether testamentary or not, is, does the legal estate in the property which

- is the subject of disposition, pass by it. *Cumming vs. Cumming et al.*
3 Kelly..... 484
9. Instruments purporting to be deeds, using words of conveyance in *presenti*, founded on a good consideration, warranting the title, sealed and delivered in the presence of two witnesses, one of whom is a Justice of the Inferior Court, conveying absolutely to trustees: 1st, for the use of the grantor during her life; and 2d, for the use of certain relations in remainder, are deeds, and not testamentary papers. *Ibid*... 485
10. Where a paper writing, in the form of a deed of gift, purporting to convey certain slaves to a trustee, in trust for the daughter-in-law of the donor, and her increase, with a covenant of warranty as to the title, the donor reserving to himself, a "life-time control and interest in the slaves," was offered in evidence: *Held*, that the paper writing was a deed, and not testamentary in its character. *Jackson et al. vs. Culpepper.* *3 Kelly*..... 583
11. To constitute an instrument in the form of a deed of gift, a testamentary paper, it is requisite that its effect should be made to depend upon the event of the death of the donor, as necessary to consummate it. *Ibid*..... 574
12. An instrument executed as a deed, but in these terms, "then the said negroes to revert back to me, (the donor,) and after my death, to be divided, &c." *Held*, to be a will. *Dudley vs. Mallery.* *4 Ga.*.... 52
13. An instrument may be a will in part, and a deed in part, even as to the same property. *Ibid.*
14. R. F. by his will, bequeathed all his property to his wife during her life or widowhood. "In case she should die or exchange her situation by marriage," then a sale to be made of all his property, and the proceeds to be equally divided among his children. *Held*, that the children took a *vested* remainder at his death. *McGinnis, Adm'r, vs. Foster, Ex'r.* *4 Ga.*..... 377
15. An instrument conveying slaves as an absolute gift on its face, with a condition, that if the grantee should die before the grantor, the property shall revert; and the expression, "when the grantee shall come into possession," &c. then certain things to be done, is a *deed* and not a *will*. *Spalding vs. Grigg.* *4 Ga.*..... 75
16. The criterion for judging, is the intent of the grantor as to the estate granted, and the time when it shall take effect. *Ibid.*
17. The postponement of the time of going into possession, is very different from the title vesting *in futuro* *Ibid.*

18. An instrument may be a will in part and a deed in part. *Robinson vs. Schley and Cooper.* 6 Ga..... 515
19. An instrument conveying negroes and their future increase, absolutely to J. S. his heirs and assigns, "but I do hereby save and reserve to myself, a life estate in the property above conveyed to said J. S. his heirs and assigns:" *Held*, to be a *deed* and not a *will*. *Ibid.*
20. A remainder in personalty may be created by deed, reserving a life estate to the grantor or any one else. *Ibid.*
21. A conveyance from M. D. M. to J. S. his heirs and assigns, of "all the cattle, horses, furniture, bank stock, money, &c. which she might leave or be possessed of at her death," is a *will* and not a *deed*. *Ibid.*
22. An instrument by which A conveys certain negroes to B, with this condition: "Nevertheless, I (the donor) have the full use of said negroes during my natural life-time, and at the time of my death, the said negroes and their increase shall rise and become the property of the said B:" *Held*, to be a *will* and not a *deed*. *Crary vs. Raulins.* 8 Ga..... 450
23. Where a particular mode is pointed out in the marriage settlement, for the disposition of the separate estate of a married woman, she cannot dispose of it in any other way; as where she had power to dispose of it by will, with the consent and approbation of her trustee, such consent is necessary to the validity of a will made by her. *Weeks et ux. vs. Sego et al.* 9 Ga..... 199
24. Where a testator made his will, disposing of his property to his wife and children then in life, and two years after the date of his will, had another child born, for whom no *positive provision* was made, and departing this life without altering said will: *Held*, that according to the provisions of the Act of 1834, the deceased must be considered as having died intestate, notwithstanding such after-born child might be entitled to some portion of the estate under the will, on the happening of certain contingencies mentioned therein, under the general description of children. *Holloman and another, Ex'r, vs. Copeland and Wife.* 10 Ga..... 79
25. Where a testator by his will devised to his wife his house and lot in the Town of LaGrange, during her *natural life or widowhood*, and also directed that "his wife should keep his house open to any of his children that may be, or have been indigent or unfortunate:" *Held*, that the complainants, who claimed to be indigent and unfortunate children of the testator, were entitled to have the house kept open for their benefit, during the natural life and widowhood of the testator's wife, and *no longer*; and that to entitle them to maintain a bill in Chancery for

relief under the will of the testator, they must show affirmatively on the face of such bill, that the widow is in life and unmarried. *Davis vs. Reed.* 10 Ga..... 293

26. Where an instrument in the form of a deed purported to convey certain property therein named, in which the party conveying "reserved to herself the use of all the property during her natural life, then to go to the above named persons, and from thenceforth to be their property absolutely, without any manner of condition:" Held, that the instrument was a testamentary paper and not a deed. *Symms vs. Arnold and Wife.* 10 Ga..... 506

27. Where testatrix by her will made the following bequest: "I give and bequeath to my son, Robert W. Carlton, during his natural life, and at his death to the lawful begotten heirs of his body, the following property, to wit: Aggy, a woman about thirty-two years of age, and the rest of her children, to wit: James, Caroline, Sarah, Manuel and John, and all their increase forever. Nevertheless, if the said Robert W. Carlton should die without an heir, then it is my desire that the above named and described negroes and their increase, be set free at his death:" Held, that the disposition of the property was good as an executory bequest, and that the children of Robert W. Carlton took the same as purchasers under the will, and not as heirs generally by descent. *Carlton and another vs. Price.* 10 Ga..... 495

II. EXECUTION AND PROBATE.

1. A will set aside on the ground of insanity, against the testimony of the subscribing witnesses, where there was proof of previous insanity, where the disposition of the property was not rational or natural, and circumstances of mystery and suspicion were thrown around the subscribing witnesses. *Griffin vs. Griffin.* R. M. Charl..... 217
2. The next of kin are entitled to call for the proof of the will of deceased, in solemn form, at any time; and mere acquiescence for a length of time, does not deprive them of this right. *Vance et al. vs. Crawford et al. Ex'rs of Keith.* 4 Ga..... 445
3. The length of time within which this may be done, is not defined at Common Law. *Ibid.*
4. But the receipt of legacies under the will, and the long acquiescence by the heirs at law, may amount to a waiver of the right, unless the delay is accounted for and excused, as by infancy, absence beyond seas, &c. *Ibid.*
5. In such a case the caveators must bring back or offer to return the legacies received by them. *Ibid.*

6. The usual mode in which assent to a will is manifested, is by subscribing it, or acknowledging the signature in the presence of the witnesses; and, ordinarily, the execution would constitute sufficient evidence of the testator's knowledge of its contents. *Beall vs. Mann, Ex'r.* 5 Ga..... 456

7. The presumption is strong against a party preparing a will, who takes a benefit under it; and although it will not be declared void on that account, strong evidence of intention in such a case will be required. *Ibid.*

8. In an issue of *devisavit vel non*, the Court will not remand the cause for a re-hearing on account of irregularities on the trial, being satisfied, from the testimony, that justice has been done, especially if the will itself appears to be reasonable, and the Court and Jury below concur in opinion, as to the capacity of the testator, and the fairness of the will. *Ibid.*

9. The 3d section of the Act of 1755, which requires all wills and testaments to be recorded within three months from the death of the testator, is not of force in Georgia. *Harrell and Harrell vs. Hamilton, Ex'r.* 6 Ga..... 37

10. The opinions of physicians, as to the sanity of the testator, are admissible, whether founded on the symptoms and circumstances, as coming within their own observation, or as testified to by others. *Potts et al. vs. House, Ex'r.* 6 Ga..... 324

11. The opinions of the subscribing witnesses to a will, as to the sanity of the testator, are admissible, without stating the facts on which they are founded. *Ibid.*

12. The mere opinions of other witnesses are not admissible, unless accompanied with the facts on which they are founded; but having stated the appearance, conduct, conversation or other particular facts, from which the state of testator's mind may be inferred, they are at liberty to express their belief or opinion, as the result of those facts. *Ibid.*

13. If a negro interpreter, incapable, by law, of being sworn, is the only channel of communication between the testator and scrivener who writes the will, and there is no other evidence of the testator's knowledge of its contents, or his assent thereto, than that which is derived through this medium, the will cannot be executed. *Ibid.*

14. But if the will be written in the presence of the testator, and in a language which he understands, and it is read over to him, and his dictation and approval of the instrument are interpreted by a negro

in his hearing, and in the hearing of others interested in its contents, and he signifies no dissent thereto, by signs or otherwise, but, on the contrary, is understood to express himself satisfied, the will may be established; especially if it appears to have been made in conformity to the previously declared intentions of the testator, as to the disposition of his property. *Ibid.*

15. As a general proposition, affirmative testimony should outweigh negative. This rule does not apply where some of the witnesses swear that the testator could measure corn, calculate interest, &c. and others, that he could not. The testimony in both cases, is of the same character. *Ibid.*
16. Neither *eccentricity* nor *imbecility of mind*, nor *extreme old age*, nor being *deaf and dumb*, whether from birth, or the calamity be superinduced, nor *incapacity to make contracts* for the purchase and sale of property, are sufficient to invalidate a will. *Ibid.*
17. The words "*non compos*" (of unsound mind,) are legal terms, and import a total deprivation of understanding. *Ibid.*
18. If a testator be *non compos*, his will is a nullity, however just and prudent its provisions. *Ibid.*
19. If the testator be *partially* deranged, either as to the legatee or subject-matter of his will, he will be considered as wanting sound and disposing mind and memory, as it respects *this particular will*, however unimpeachable his character and capacity in other respects. *Ibid.*
20. If the testator has capacity to recollect, discern and feel the relations, connections and obligations of family and kindred, his will shall stand, however capricious or unreasonable its provisions. *Ibid.*
21. Influence in procuring a will to be made, *to be undue*, must amount to *moral coercion*; it must destroy the free agency of the testator, and constrain him to do what is against his will, but what he is unable to refuse; and it is immaterial whether this undue influence be exercised by a negro or a free white person. *Ibid.*
22. Under the Statute of Frauds, requiring wills to be subscribed by the attesting witnesses, in the presence of the testator, it is not necessary that the witnesses should be in the same room, or the same house with him; or that the testator should in fact see the witnesses subscribe their names; but it is necessary that the situation and circumstances of the testator and witnesses are such, that the testator, in his actual position, might have seen the act of attestation. *Robinson & Wood vs. King. 6 Ga.*..... 539
23. To the validity of a will of personalty, it is only necessary that it

be made by or according to the directions of the deceased, and be in writing. It is not necessary that it be witnessed, or written, or signed by the testator; if drawn up according to his directions, or approved by him, it may operate as a valid will. *Frierson and Wife vs. Beall, Ex'r.* 7 Ga..... 438

24. The presumption of law is against any testamentary paper not actually executed by the testator. The presumption, however, thus raised, is slight, and may be repelled by proof. *Ibid.*

25. Where the testator's design of perfecting the paper is frustrated by death, or insanity, or any other involuntary preventive cause, no inference of the absence of testamentary intention arises from the imperfect state of the document, which notwithstanding its defect, will be accepted as the will of the deceased, provided the proof shows clearly that it fully discloses the testamentary scheme of the testator. *Ibid.*

26. Where the testator dies before the instrument is finished, it does not follow that in all cases the instrument will be established *as far as it goes.* *Ibid.*

27. The rule in the case of every unfinished paper is this: can the Court collect, from all the circumstances of the case, that the document propounded contains the final wish and intention of the testator, respecting the property thereby bequeathed? If so, it will be its duty to pronounce for it. *Ibid.*

28. It is not indispensably necessary to the validity of a will made by a blind man, or one who is so illiterate that he is unable either to read or write, that it should be read over to him in the presence of the subscribing witnesses; it is sufficient for the Jury to be satisfied that the paper propounded as such, is the last will and testament of the deceased. *Clifton vs. Murray.* 7 Ga..... 564

29. As to construction of particular bequests, see *Devise and Legacy.*

30. As to wills manumitting slaves, see *Slaves, II.*

See *Deeds; Election; Insanity.*

WITNESS. See *Accomplice; Evidence; Promissory Notes, VI.*

WRIT OF ERROR. See *Error, II.*

